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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 76

Sep No. 55

THE ALLEGHENY LUDLUM STEEL CORPORATION, APPELLANT,

vs.

WILLIAM J. KELLEY AND H. MYRON LEWIS, CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF CHAUTAUQUA

FILED APRIL 3, 1946.

SUPREME COURT OF THE UNITED STATES

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WILLIAM J. KELLEY AND H. MYRON LEWIS, CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF CHAUTAUQUA

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[fol. 1]

IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

THE ALLEGHENY LUDLUM STEEL CORPORATION, Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, Constituting the State Labor Relations Board of the State of New York, Defendants.

NOTICE OF APPEAL—Filed October 28, 1944

SIR:

Please Take Notice that The Allegheny Ludlum Steel Corporation, hereby appears to the Appellate Division of the Supreme Court for the Fourth Department from an order made in the above entitled action at a Special Term of this Court held in and for the County of Chautauqua on the 26th day of September, 1944, and entered in the Chautauqua County Clerk's office on the 3rd day of October, 1944, dismissing the complaint herein upon the merits and not as a matter of discretion, and from each and every part of said order.

Please Take Further Notice that the plaintiff, The Allegheny Ludlum Steel Corporation, hereby appeals to the Appellate Division of the Supreme Court for the Fourth Department from the judgment entered herein in the office of the Clerk of Chautauqua County on the 3rd day of October, 1944 wherein it was adjudged that the complaint herein be dismissed on the merits and not as a matter of discretion.

Dated: Buffalo, N. Y., October 27, 1944.

Yours etc., Moot, Sprague, Marcy & Gulick, Attorneys for Appellant, Office and P. O. Address, 302 Erie County Bank Bldg., Buffalo 2, N. Y.

To: William E. Grady, Jr., Esq., Attorney for Respondent, Office and P. O. Address, 250 W. 57th St., New York, N. Y.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

NOTICE OF SETTLEMENT

SIRS:

Please Take Notice that a judgment of which the within is a true copy will be presented for settlement and signature to Mr. Justice Hinkley at a Special Term of this Court for the County of Chautauqua, at the County Courthouse in Erie County in the City of Buffalo, State of New York, on the 14th day of August, 1944, at 10:00 o'clock in the forenoon.

Dated, New York, N. Y., August 7, 1944.

Yours, etc., William E. Grady, Jr., Attorney for Defendants, Office and Post Office Address, 250 West 57th Street, Borough of Manhattan, City of New York.

To: Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiff, Office and Post Office Address, 302 Erie County Savings Bank Building, Buffalo 2, New York.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

At a Special Term of the Supreme Court of the State of New York held for the County of Chautauqua at the County Courthouse in Erie County in the City of Buffalo, New York, on the 26 day of Sept. 1944 R.

Present: Honorable Alonzo G. Hinkley, Justice.

THE ALLEGHENY LUDLUM STEEL CORPORATION, Dunkirk, N. Y., Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, Constituting the State Labor Relations Board of the State of New York, of 250 W. 57th St., New York City, Defendants

JUDGMENT— Entered October 3, 1944

An order having been made on Sept. 26, 1944, at a Special Term of this Court held for the County of Chautauqua at

the County Courthouse in Erie County in the City of Buffalo, New York, granting defendants' motion for judgment on the pleadings under Rule 112 of the Rules of Civil Practice and granting defendants' motion for summary judgment under Rule 113 of the Rules of Civil Practice, and directing that defendants have judgment dismissing the complaint herein on the merits and not as a matter of discretion, and said order having been duly entered in the Chautauqua County Clerk's office on Oct. 3, 1944.

Now, on motion of William E. Grady, Jr., Attorney for the defendants, it is

Adjudged and Decreed, that the defendants do hereby have judgment dismissing the complaint on the merits and not as a matter of discretion and that the complaint herein be, and hereby is dismissed on the merits and not as a matter of discretion.

Enter in County of Chautauqua.

Alonzo G. Hinkley, Justice of the Supreme Court.

[fol. 4] AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Bert Radeloff, being duly sworn, deposes and says that she is a secretary in the office of William E. Grady, Jr., the attorney for the above named defendants herein. That on the 7th day of August 1944, she served the within Proposed Judgment with Notice of Settlement upon Moot, Sprague, Marcy & Gulick, Esqs., the attorneys for the within named plaintiff by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 250 West 57th Street, in said County of New York, directed to said attorneys for the plaintiff at No. 302 Erie County Savings Bank Building, Buffalo 2, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action as the place where they then kept an office, between which places

there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Bert Radeloff.

Sworn to before me this 7th day of August, 1944.
William J. Peterson, Notary Public, Queens Co.
No. 1627.

[fol. 5] In Supreme Court of New York, County of Chautauqua

[Title omitted]

Notice of Settlement

Sirs:

Please Take Notice that an order of which the within is a true copy will be presented for settlement and signature to Mr. Justice Hinkley at a Special Term of this Court for the County of Chautauqua, at the County Courthouse in Erie County in the City of Buffalo, State of New York, on the 14th day of August, 1944, at 10:00 o'clock in the forenoon.

Dated, New York, N. Y., August 7, 1944.

Yours, etc., William E. Grady, Jr., Attorney for Defendants, Office and Post Office Address, 250 West 57th Street, New York, N. Y.

To: Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiff, Office and Post Office Address, 302 Erie County Savings Bank Building, Buffalo 2, New York.

[fol. 6] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

At a Special Term of the Supreme Court of the State of New York, held for the County of Chautauqua at the County Courthouse in Erie County in the City of Buffalo, New York, on the 26 day of Sept. 1944.

Present: Honorable Alonzo G. Hinkley, Justice.

THE ALLEGHENY LUDLUM STEEL CORPORATION, Dunkirk, N. Y., Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, Constituting the State Labor Relations Board of the State of New York, 250 W. 57 St. N. Y. City, Defendants

ORDER—Filed October 3, 1944

The defendants above named having duly moved under Rule 112 of the Rules of Civil Practice for an order for judgment on the pleadings dismissing the complaint herein, and under Rule 113 of the Rules of Civil Practice for an order dismissing the complaint herein and directing that judgment be entered in favor of defendants herein upon the ground that the action has no merit, and said motions having duly and regularly come on to be heard,

Now, on reading and filing the complaint and amended answer herein and the notice of motion dated the 2nd day of June, 1944, with proof of due service thereof, in support of the motion under Rule 112 of the Rules of Civil Practice, and on reading and filing the said complaint and amended answer herein, the said notice of motion dated the 2nd day of June, 1944, with proof of due service thereof, the affidavits of H. Myron Lewis, sworn to the 31st day of May, 1944 and the 19th day of July, 1944 respectively, and the exhibit thereto annexed, and the affidavit of Ernest E. Cavagnaro sworn to the 31st day of May, 1944, in support of the *the* motion under Rule 113 of the Rules of Civil Practice, and the affidavit of Stanley A. McCaskey, Jr., sworn [fol. 7] to the 27th day of June, 1944, in opposition to said motion under Rule 113, and after hearing Daniel Kornblum, Esq., attorney for defendants, by William E. Grady, Jr., Esq., of counsel in support of said motions, and Moot, Sprague, Marcy & Gulick, Esqs., attorneys for plaintiff, by

Welles V. Moot, Esq., of counsel in opposition thereto, and all facts having been duly stipulated and due deliberation having been had, and upon the filing of the opinion of this Court, now, on motion of William E. Grady, Jr., Esq., attorney for defendants, and he having objected to findings of fact and conclusions of Law, it is

Ordered, that the said motions be, and the same hereby are, granted in all respects, and it is further

Ordered, that the complaint in this action be, and the same hereby is, dismissed upon the merits and not as a matter of discretion, and that judgment be entered herein in favor of the defendants and against the plaintiff dismissing the said complaint upon the merits and not as a matter of discretion.

Enter in County of Chautauqua.

Alonzo G. Hinkley, Justice of the Supreme Court.

[fol. 8] AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Bert Radeloff, being duly sworn, deposes and says that she is a secretary in the office of William E. Grady, Jr., the attorney for the above named defendants herein. That on the 7th day of August, 1944, she served the within Proposed Order with Notice of Settlement upon Moot, Sprague, Marcy & Gulick, Esqs., the attorneys for the within named plaintiff by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 250 West 57th Street, in said County of New York, directed to said attorneys for the plaintiff, at No. 302 Erie County Savings Bank Building, Buffalo 2, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action as the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Bert Radeloff.

Sworn to before me this 7th day of August, 1944.
William J. Peterson, Notary Public, Queens Co., No. 1627.

[fol. 9] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

STATE OF NEW YORK,
County of New York,
City of New York, ss:

David A. Sterling, being duly sworn, deposes and says: that he is over the age of twenty-one years and resides in the City of New York.

That on the 14th day of April, 1944, at No. 250 West 57th Street, New York City, New York he served the summons and complaint in this action upon William J. Kelley and Myron Lewis, constituting the State Labor Relations Board of the State of New York, the defendants in this action by delivering a true copy of said summons and complaint to each of said defendants personally and leaving the same with them. He further says that he knew the persons so served as aforesaid to be the same persons mentioned and described in the said summons and complaint as the defendants in this action.

David A. Sterling.

Sworn to before me this 14th day of April, 1944. Jacob R. Silvermintz, Notary Public Kings Co., No. 1125, Reg. No. 445-S-5. Cert. filed in N. Y. Co., No. 1039, Reg. No. 598-S-5. Commission expires March 30, 1945.

[fol. 10] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the Complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons to serve a notice of appearance, on the Plaintiff's Attorneys, within twenty days after the service of this Summons, exclusive of the

day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Erie.

Dated this 10th day of April, 1944.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff, Office and P. O. Address, 302 Erie County, Savings Bank Bldg., Buffalo, N. Y.

[fol. 11] In Supreme Court of New York, County of Chautauqua

The Allegheny Ludlum Steel Corporation, Plaintiff,

against

William J. Kelley and Myron Lewis, Constituting the State Labor Relations Board of the State of New York, Defendants

Complaint—Filed October 3, 1944

Plaintiff, by Moot, Sprague, Marcy & Gulick, its attorneys, for its complaint herein alleges:

1. That it is a corporation duly incorporated under the laws of the Commonwealth of Pennsylvania and having its principal place of business in Allegheny County, Pennsylvania, and that it is duly registered pursuant to the Laws of the State of New York to do business therein.

2. That plaintiff owns a steel mill and leases from Defense Plant Corporation a second steel mill in the City of Dunkirk, Chautauqua County, New York, and that plaintiff operates the said mills hereinafter referred to as plaintiff's plant. That plaintiff has its principal place of business within the State of New York at the said City of Dunkirk, in Chautauqua County, New York.

3. Upon information and belief that the defendants, William J. Kelley and Myron Lewis, constitute the State Labor Relations Board of the State of New York, having been duly appointed pursuant to the provisions of Article 20 of the Labor Law of the State of New York and are charged with various duties by Article 20 of the said Labor Law.

[fol. 12] 4. That among these duties is that of making investigations and determining appropriate units of employees for collective bargaining, holding elections for such employees to enable the said employee units to designate representatives for the purpose of collective bargaining and thereafter certifying duly elected representatives as exclusive representatives of employees in the unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment, but that these duties may be undertaken by the said Board only insofar as their action in connection therewith would not conflict with the action, jurisdiction or policy of the National Labor Relations Board as prescribed by the National Labor Relations Act.

5. Upon information and belief that the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, is a labor union and, upon information and belief, that its membership is limited to supervisory employees whose work consists solely of supervising other employees of the plaintiff hired in connection with the operation of plaintiff's said Dunkirk plant.

6. Upon information and belief that heretofore and on or about the 2nd day of January 1944, the said Union filed its petition with the said Labor Relations Board in writing, alleging that a question or controversy had arisen concerning the representation of supervisory employees of the plaintiff and said petition requested that the said Board investigate such question or controversy and certify said Union as the appropriate representative for collective bargaining by such supervisory employees of plaintiff at its said plant.

7. That acting upon said petition the defendants have conducted various hearings for the purpose of investigating [fol. 13] questions raised by said petition and have subpoenaed certain of the records of the plaintiff and taken evidence and heard testimony with regard to issues purportedly raised by said petition.

8. That plaintiff has duly moved that said petition be dismissed upon the ground that the Labor Relations Board of the State of New York has no jurisdiction in the premises and because said Union is not an appropriate collective bargaining unit.

9. That defendants have refused to agree with the plaintiff that plaintiff's employees at its said Dunkirk plant are subject to and protected by the provisions of the National Labor Relations Act, and that the defendants continue wrongfully to assert jurisdiction of the matters covered by the said petition.

10. That approximately 95% in value of the products shipped from said Dunkirk plant are shipped to points outside the State of New York and 86% in value of raw materials purchased for use in the said plant are received from outside the State of New York and of materials partially fabricated at other plants of the corporation and shipped to said Dunkirk plant for further fabrication over 85% in value are shipped to said Dunkirk plant from outside the State of New York and the Allegheny Ludlum Steel Corporation in operating its said plant in the City of Dunkirk is engaged in interstate commerce.

11. That the Congress of the United States has heretofore enacted the National Labor Relations Act (U. S. Code, Title 29, Chap. 27; 29 U. S. C. A. 151 ff.) and that said Act has been duly signed by the President of the United States and has at all times herein mentioned been in full force and effect.

12. That pursuant to said National Labor Relations Act the United States Government has assumed jurisdiction of [fol. 14] labor disputes which may affect interstate commerce and Congress has delegated to the National Labor Relations Board, appointed pursuant to the provisions of said Act, certain duties and powers in connection with the regulation of employer-employee relationships which may affect interstate commerce.

13. That pursuant to said National Labor Relations Act the National Labor Relations Board has the sole power to determine appropriate bargaining units among the employees of the plaintiff at its said Dunkirk plant whether said employees are or are not employed in a supervisory capacity.

14. That it is the settled policy of the National Labor Relations Board to refuse to certify a union of supervisory employees of such a character as the Foremen's Association of America, Allegheny Ludlum Steel Corporation

Chapter No. 58, as a bargaining agent because the said National Labor Relations Board does not regard a bargaining unit consisting solely of supervisory employees whose only work is to supervise other employees as an appropriate bargaining unit and that except under exceptional circumstances which do not obtain in the premises certification of all unions of supervisory employees has been refused by the said National Labor Relations Board.

15. That said National Labor Relations Board has in a certain case entitled "Matter of Allegheny Ludlum Steel Corporation and Steel Workers Organizing Committee, Case No. III-R-411" exercised jurisdiction over plaintiff and over certain of the employees of said Dunkirk mills of the plaintiff and certified a collective bargaining representative for said employees, which certification is still in full force and effect.

16. That by virtue of the Acts of Congress and the acts and decisions of the National Labor Relations Board, [fol. 15] Congress and the National Labor Relations Board have assumed jurisdiction over the entire field of controversies within which the present controversy falls.

17. That as to all such matters the jurisdiction of the National Labor Relations Board of the United States Government is exclusive and that the Labor Relations Board of the State of New York has no jurisdiction to entertain the said petition or to make any determination of the questions and issues raised and presented by the said petition and presently before the State Labor Relations Board.

18. That the provisions of the Laws of the State of New York, and particularly of Article 20 of the Labor Law of the State of New York, do not confer jurisdiction of said questions, issues and other matters covered by the said petition upon the Labor Relations Board of the State of New York.

19. That by reason of the threatened continuance of said proceedings before the New York State Labor Relations Board, plaintiff is threatened with the issuance of an order by the said defendants constituting said Board, pursuant to which order an election to determine a bargaining unit for the said supervisory employees of the plaintiff will be held, and the holding of such an election and the

issuance of such order will cause irreparable harm and damage to the plaintiff. Such action of the defendants destroys the harmonious relations between plaintiff and its supervisory employees, defeats the purpose of the Act by causing instead of preventing labor disputes and places plaintiff in a position of being ordered to perform actions and to conduct itself in relation to its supervisory employees in a manner directly in conflict with the declared policy of the National Labor Relations Board all of which impairs the war effort.

[fol. 16] 20. That by reason of the foregoing the plaintiff is threatened with substantial and irreparable injury because no review of the threatened actions of the State Labor Relations Board can be had in the courts pursuant to the Labor Law until after an election has been held as aforesaid and plaintiff has refused to recognize the bargaining agent certified by the State Labor Board and said Board has thereafter made a final order adjudging plaintiff to have committed an unfair labor practice and because it may hereafter be subjected to conflicting rulings of the State Labor Relations Board and the National Labor Relations Board as regards its relations with its said supervisory employees and with the said Union and may be directed by the New York State Labor Relations Board to do that which is illegal under the National Labor Relations Act and the rulings of the National Labor Relations Board.

21. The plaintiff further is advised and believes that the actions of the New York State Labor Relations Board in the premises and the provisions of the New York State Labor Relations Act, insofar as the same may apply to plaintiff and its relation to its supervisory employees, are void because in violation of the provisions of the Constitution of the United States, since that Act as the said State Board threatens to apply it in this instance denies due process of law and violates Article I, Section 8, giving the Federal Government control of interstate commerce.

22. That plaintiff has no adequate remedy at law.

23. That plaintiff, in view of the inapplicability of the provisions of the New York State Labor Relations Act to plaintiff and to plaintiff's relations with its said supervisory employees, is bringing this action in this court

pursuant to Section 473 of the Civil Practice Act to obtain a judicial determination of the jurisdiction of the Labor Relations Board of the state of New York in the premises, [fol. 17] which is desirable and necessary to prevent the possible unauthorized action on the part of defendants comprising the New York State Labor Relations Board by ordering and holding an election to choose a representative to bargain collectively on behalf of plaintiff's said supervisory employees and to prevent the said Board from attempting to force plaintiff to bargain collectively with representatives of the said Union and to prevent the said Board from taking any further steps directed against plaintiff under the authority which said Board improperly maintains has been given to it by the provisions of the Statutes of the State of New York and particularly to prevent plaintiff from being subjected in the future to conflicting orders and rulings of the New York State Labor Relations Board and the National Labor Relations Board.

Wherefore, plaintiff prays that a declaratory judgment be made and entered herein adjudging and decreeing:

1. That the provisions of the New York State Labor Relations Act (Labor Law, Article 20) do not apply to the plaintiff in the premises.

2. That the provisions of the New York State Labor Relations Act (Labor Law, Article 20) do not apply to the plaintiff in its relations with its supervisory employees at its said Dunkirk mills and plant.

3. That the defendants comprising the New York State Labor Relations Board have no jurisdiction over the plaintiff or over the supervisory employees of the plaintiff at its said plants.

4. That the defendants comprising the New York State Labor Relations Board may not properly certify the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, as the appropriate collective [fol. 18] bargaining unit for the foremen or other supervisory employees of the plaintiff at its said Dunkirk plant.

5. That the defendants comprising the New York State Labor Relations Board have no jurisdiction to hold an election or to attempt to hold an election for the purpose

of determining a representative of the said supervisory employees to bargain collectively with the plaintiff or to order the plaintiff to bargain collectively with any such representative.

6. That the defendants comprising the New York State Labor Relations Board be restrained and enjoined pending the determination of this action and thereafter from taking any steps which directly or indirectly interfere with the plaintiff in any way and, further, from holding an election or attempting to hold an election for the purpose of determining a representative of the said supervisory employees to bargain collectively with the plaintiff or from taking any other action in connection with plaintiff or its employees under the provisions of the New York State Labor Relations Act.

7. That plaintiff have such other, different and further relief, decree or judgment in the premises as may be just and proper, together with the costs and disbursements of this action.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff., Office and P. O. Address, 302 Erie County Bank Building., Buffalo 2, New York.

[fol. 19] *Duly sworn to by E. J. Hanley. Jurat omitted in printing.*

[fol. 20] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

THE ALLEGHENY LUDLUM STEEL CORPORATION, Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, constituting the State Labor Relations Board of the State of New York, Defendants.

AMENDED ANSWER—Filed Oct. 3, 1944

Defendants, by Daniel Kornblum, their attorney, for their amended answer to plaintiff's complaint, allege:

1. Deny each and every allegation contained in paragraphs "12", "13", "14", "16", "17", "18", "20", "21", "22" and "23" of the complaint.

2. Deny each and every allegation contained in paragraph "4" of the complaint, except defendants admit that the jurisdiction authority, powers, duties and functions of the New York State Labor Relations Board, hereinafter called the Board, are as set forth in Article 20 of the Labor Law of the State of New York, known as the New York State Labor Relations Act, hereinafter called the Act.

3. Deny upon information and belief each and every allegation contained in paragraph "5" of the complaint, except defendants admit that Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection; that its membership is limited to foremen, and that it excludes from membership any "foreman or supervisor, who is an employer of labor, or individual in a position to act as negotiator in the interests of employer policy."

4. Deny each and every allegation contained in para-
[fol. 21] graph "6" of the complaint, except defendants admit that on December 30, 1943, Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, filed with the New York State Labor Relations Board a petition in writing requesting that the Board investigate a question or controversy allegedly existing concerning the representation of foremen at plaintiff's Dunkirk plant and further requesting that the Board, upon completion of its investigation, certify to the parties the name of the collective bargaining representative selected by such employees.

5. Deny each and every allegation contained in paragraph "7" of the complaint, except defendants admit that hearings, in aid of the New York State Labor Relations Board's investigation of the question or controversy alleged in the said petition referred to in paragraph "4" hereof, were held on February 23 and 24, 1944, before I. L. Broadwin, Esq., one of the said Board's Trial Examiners, that testimony was taken and that records of plaintiff were subpoenaed and received in evidence, and

that argument concerning said question or controversy was heard by the defendant Members of said Board on April 12, 1944.

6. Deny each and every allegation contained in paragraph "8" of the complaint, except defendants admit that at the hearing of February 24, 1944, before said Trial Examiner, plaintiff, by its counsel, William H. Eckert, Esq., made the following motion; "We move that the petition of the Foremen's Association of America, Allegheny Steel Corporation Chapter #58, be dismissed for the reasons briefly, that the New York State Labor Relations Board does not have jurisdiction in this case and because the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, is not an appropriate unit for collective bargaining purposes."

7. Deny each and every allegation contained in paragraph "9" of the complaint, except defendants admit that on May 24, 1944, William J. Kelley, O. M. I. and H. Myron Lewis, constituting the New York State Labor Relations Board, duly issued and served upon plaintiff its Decision [fol. 22] and Direction of Election in the proceeding referred to in paragraph "4" hereof, a copy of which is annexed hereto and made a part of this answer with the same force and effect as if set forth at length herein.

8. Deny any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph "15" of the complaint, except defendants admit, on information and belief, that heretofore the National Labor Relations Board on or about June 29, 1942, certified United Steel Workers of America, C. I. O., as exclusive collective bargaining representative of certain non-supervisory employees at plaintiff's Dunkirk plant.

9. Deny each and every allegation contained in paragraph "19" of the complaint, except defendants admit that on May 24, 1944, defendants, William J. Kelley, O. M. I. and H. Myron Lewis, constituting the New York State Labor Relations Board, duly issued and served upon plaintiff its Decision and Direction of Election in the proceeding referred to in paragraph "4" hereof, a copy of which is annexed hereto and made a part of this answer with the same force and effect as if set forth at length herein.

For a First, Separate and Distinct Affirmative Defense, Defendants Allege:

10. The defendants, William J. Kelley, O. M. L, and H. Myron Lewis, constitute the New York State Labor Relations Board, hereinafter called the Board.

11. The Board is an agency duly established by Article 20 of the Labor Law of the State of New York.

12. The jurisdiction, powers, authority, duties and functions of the Board are as set forth in said Article 20 of the Labor Law.

13. On December 30, 1943, Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, filed with the Board a petition in writing alleging that a question or controversy exists as to representation [fol. 23] for purposes of collective bargaining of foremen at plaintiff's plant located at Dunkirk, N. Y., and requesting the Board to investigate and certify Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, as collective bargaining representative of such foremen.

14. Hearings in aid of the Board's investigation as to the alleged question or controversy set forth in said petition were duly held on February 23 and 24, 1944, in Buffalo, New York, before I. L. Broadwin, Esq., a Trial Examiner duly appointed and designated by the Board.

15. At such hearings, plaintiff appeared specially.

16. At such hearings plaintiff was represented by counsel and received full opportunity to and did examine and cross-examine witnesses, offer evidence and received full opportunity to be heard.

17. At said hearings stenographic minutes were taken of all testimony and proceedings, and exhibits were offered and received in evidence.

18. On February 24, 1944, at said hearing before the said Trial Examiner, the following motion was made by plaintiff's counsel, William H. Eckert, Esq.: "We move that the petition of the Foremen's Association of America, Allegheny Steel Corporation Chapter #58, be dismissed for the reasons, briefly, that the New York State Labor

Relations Board does not have jurisdiction in this case and because the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, is not an appropriate unit for collective bargaining purposes."

19. Decision on said motion referred to in paragraph "18" above was reserved by the said Trial Examiner.

20. At request of the plaintiff, oral argument was heard by the Board on April 12, 1944.

21. Stenographic minutes were taken of said oral argu- [fol. 24] ment referred to in paragraph "20" above.

22. On May 24, 1944, defendants, William J. Kelley, O. M. I. and H. Myron Lewis, constituting the New York State Labor Relations Board, duly issued and served upon plaintiff its Decision and Direction of Election in the proceeding referred to in paragraph "13" hereof, a copy of which is annexed hereto and made a part of this answer with the same force and effect as if set forth at length herein.

23. The administrative remedies of plaintiff are as set forth in Article 20 of the Labor Law.

24. Plaintiff has not exhausted the administrative remedies provided in Article 20 of the Labor Law.

For a Second, Separate and Distinct Affirmative Defense, Defendants Allege:

25. Defendants reallege each and every allegation contained in paragraphs "10" through "23" inclusive, of this answer with the same force and effect as if set forth at length herein.

26. The exclusive means of judicial review of proceedings before, and acts of, the Board are those provided in Article 20 of the Labor Law.

27. No provision is made for this action in Article 20 of the Labor Law.

28. Plaintiff has an adequate remedy at law.

For a Third, Separate and Distinct Affirmative Defense, Defendants Allege:

29. Defendants reallege each and every allegation in paragraphs "10" through "23" inclusive, and in para-

graphs "26" and "27" of this answer with the same force and effect as if set forth at length herein.

30. This Court does not have jurisdiction of the subject of this action.

[fol. 25] For a Fourth, Separate and Distinct Affirmative Defense, Defendants Allege:

31. Defendants reallege each and every allegation contained in paragraphs "10" through "23" inclusive, and in paragraphs "26" and "27" of this answer with the same force and effect as if set forth at length herein.

32. This Court in its discretion should decline to take jurisdiction of this action.

For a Fifth, Separate and Distinct Affirmative Defense, Defendants Allege:

33. The jurisdiction, powers, authority, duties and functions of the National Labor Relations Board are as set forth in the National Labor Relations Act, United States Code, Title 29, Chapter 27, as amended.

34. Upon information and belief no petition alleging that a question or controversy exists as to representation of foremen for purposes of collective bargaining, at plaintiff's plant located at Dunkirk, or requesting the National Labor Relations Board to investigate and certify Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter #58, as collective bargaining representative of such foremen, has been filed with the National Labor Relations Board.

For a Sixth, Separate and Distinct Affirmative Defense, Defendants Allege:

35. Defendants reallege each and every allegation contained in paragraph "33" of this answer with the same force and effect as if set forth at length herein.

36. The National Labor Relations Board has not assumed or asserted jurisdiction of any alleged question or controversy concerning representation of foremen for purposes of collective bargaining, at plaintiff's plant located in Dunkirk, N. Y.

37. The National Labor Relations Board has not assumed or asserted jurisdiction of any request to certify Foremen's Association of America, Allegheny Ludlum Steel [fol. 26] Corporation Chapter #58, as representative of foremen for purposes of collective bargaining at plaintiff's plant located in Dunkirk, N. Y.

Wherefore, defendants pray that judgment be made and entered herein, adjudging and decreeing that the complaint herein be dismissed, and that defendants have such other, different and further relief, decree or judgment in the premises as may be just and proper, together with the costs and disbursements of this action.

Dated: New York, N. Y., May 24, 1944.

Daniel Kornblum, Attorney for Defendants. Office & P. O. Address, 250 West 57th Street, Borough of Manhattan, 19, City of New York.

[fol. 27] BEFORE THE STATE LABOR RELATIONS BOARD, STATE OF NEW YORK

Decision No. 2751. Case No. WE-373

In the Matter of ALLEGHENY LUDLUM STEEL CORPORATION and FOREMEN'S ASSOCIATION OF AMERICA, ALLEGHENY LUDLUM STEEL CORPORATION CHAPTER No. 58

Appearances:

Ernest E. Cavagnaro, Esq., for the Board.

Smith, Buchanan & Ingersoll, Esqs., by William H. Eckert, Esq., and Moot, Sprague, Marcy & Gulick, Esqs., by Wells V. Moot, William Cannable and William Gage, Esqs., appearing specially for the Employer.

Walter M. Nelson, Esq., and Edward J. Greder, Jr., for Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58.

Robert H. Keys for Foremen's Association of America.

Neal J. Cunningham for American Federation of Labor.

DECISION AND DIRECTION OF ELECTION

Statement of the Case

On December 30, 1943, Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58,

unaffiliated, herein, called the Union, petitioned the Board, pursuant to Section 705 of the New York State Labor Relations Act, to investigate an alleged question or controversy concerning the representation of foremen employed by the Company at its Dunkirk, N. Y., plant.

A hearing was held in Buffalo, N. Y., before I. L. Broadwin, Trial Examiner, on February 23 and 24, 1944. The Company appeared specially to challenge the jurisdiction of the Board. Both the Company and the Union participated in the hearing, the former without waiving its special appearance, and both were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues. At the close of the hearing, the Company moved to dismiss the petition on the grounds that the Board does not have jurisdiction of this case and that the unit sought, consisting of supervisory employees, was not appropriate for collective bargaining purposes. Decision was reserved. For reasons stated hereinafter, the motion is denied.

[fol. 28] At the hearing, a representative of the American Federation of Labor attended but offered no formal appearance in the proceeding. He was informed by the Trial Examiner of his right under the Board's rules to file a written petition to intervene on behalf of his organization. However, no such petition was filed in its behalf, nor was any proof of its interest in this matter offered. Accordingly, the American Federation of Labor is not made party to this proceeding.

In the course of the hearing, a carbon copy of a letter sent by Edward J. Greder, Jr., president of Chapter 58, to F. B. Lounsberry, the Company's vice-president in charge of manufacturing at Brackenridge, Pa., was received as Board's Exhibit No. 19 for identification. Counsel for the Company consented that the letter be marked in evidence if, upon investigation, he ascertained that the original had been received by the Company. The Board has since been notified by a letter from counsel for the Company that the original had been received by the Company. Accordingly, the letter so marked for identification, together with the letter admitting receipt of the original, is received in evidence and marked as a single exhibit, "Board's Exhibit No. 19."

At the request of the Company, oral argument was heard by the Board on April 12, 1944. In addition, various briefs

have been filed by both the Company and the Union. The Board has duly considered the record of the oral argument and the briefs.

Upon the entire record in the case, the Board makes the following

Findings of Fact

I. The Employer

Allegheny Ludlum Steel Corporation is a Pennsylvania corporation licensed to do business in New York. Its main office and principal plant are located in Brackenridge, Pa. It also has plants in Leechburg, Pa., Dunkirk, N. Y., in Michigan and California. In addition, it maintains warehouses in various other states.

The instant case involves only the Company's division at Dunkirk, N. Y. The Dunkirk branch is made up of two plants situated on adjoining pieces of land, although the two buildings are not contiguous. One of the plants is known as the Howard Avenue plant and is owned outright by the Company. The other is known as the Brigham Road plant; it is owned by the United States Government through the Defense Plant Corporation which, in turn, leases the plant and equipment in its entirety to the Company. The Company operates the two plants as a single unit, and they are referred to jointly as the Dunkirk plant.

At the Dunkirk plant, the Company manufactures tube steel, alloy steel, valve steel and stainless steel. It employs about 2100 rank and file workers. There are also about 46 foremen, shift foremen, general foremen, and general shift foremen, who are the only employees involved in the present proceeding. In addition, the plant employs the services of a general manager, assistant general manager, production manager, manager, superintendents, shift superintendents, assistant superintendents, and supervisors.

About 95%, by value, of the products produced at the Dunkirk plant are shipped to points outside of New York State. About 86%, by value, of the raw materials used at the Dunkirk plant are brought from points outside New York State. About 85%, by value, of partially fabricated materials are brought to the Dunkirk plant from points outside New York State for further fabrication. The Union concedes that the Company is engaged in interstate commerce.

[fol. 29] II. The Employees Involved

The present case involves only the formen, shift foremen, general foremen and general shift foremen employed by the Company at its Dunkirk plant. There are about 46 such employees, all of them full time employees; there are no part-time, temporary or casual employees in these groups.

To a large extent, their classification depends upon the number of foremen in a department. There is no difference between the duties of "foremen" and "shift foremen" only that the first title applies in a department which works but one shift during the day, and the latter if the department works two or three shifts during the day. The same descriptive distinction applies as between general foremen and general shift foremen.

A foreman or shift foreman has immediate supervision over the rank and file employees in a given department. Where a certain process of manufacture utilizes more than one department, there is a general foremen or a general shift foreman over all foremen or shift foremen involved in the process. This is to coordinate the work of the various foremen or shift foremen so that the process operates as a unified whole. On questions of production, the general foreman or general shift foreman has authority superior to that of the foremen or shift foreman. But on matters affecting personnel their authority is no greater. Nor do the general foremen and general shift foremen have any control over the terms and conditions of employment of the foremen and shift foremen.

About 30 of the employees here involved are compensated on the basis of hourly rates of pay plus bonuses. These computations are made at and paid directly in Dunkirk. The remaining 16 employees are paid a monthly salary in the form of semi-monthly checks which are sent from the Brackenridge, Pa., office. Those paid monthly receive slightly higher compensation than those paid hourly rates. Generally speaking, those receiving monthly salaries include the general foremen and general shift foremen, while all of those paid on an hourly basis are foremen or shift foremen.

For convenience, we will heinafter refer to all four of these groups as "foremen," since for the purposes of this case the parties have treated them alike.

The Limits of Supervisory Authority of the Foremen

The general duties of the foremen are to supervise the rank and file employees, to lay out and assign work, to see that instructions are carried out, to check on absenteeism and assign other workers to fill in for absentees. The Union concedes that the foremen are supervisory employees. They spend their full time supervising others and do no manual work.

However, the Company concedes that these foremen are not executives and do not participate in the formulation of managerial policies. They do not represent the Company in collective bargaining negotiations with the labor organization representing the rank and file employees. They do not have access to the Personnel Department's confidential information concerning the rank and file employees.

The foremen have no authority to hire, fire, promote or demote rank and file employees. All they may do is to recommend such action to their superiors, the superintendents or assistant superintendents who, in turn, must pass the recommendation on to still higher officials. Those who have final authority always consult with the foremen concerned before taking any such action. The final authority [fol. 30] on all these matters lies with the general manager, or with an impartial umpire if the union representing the rank and file employees takes up the matter as a grievance. The recommendations of the foremen are given "serious consideration" by those having final authority, and the general manager of the Dunkirk plant testified that the foremen's recommendations are accepted in a majority of cases, but not always.

Grievances of rank and file employees are first taken up with the foremen by the shop steward of the union representing the rank and file employees. Many grievances are settled at this stage. If not so adjusted, the union may take them up in writing with the superintendent and if not settled then, they are presented to a grievance committee consisting of representatives of the union and the Company. The Company's representatives investigate the matter, during which they obtain from the foreman his version of the dispute and his recommendations. Again this recommendation is given "serious consideration" by the Company and is generally accepted by it. If no settlement is

reached by the grievance committee, the matter may then be referred to an impartial umpire.

The foremen have no authority to grant wage increases to rank and file employees. The most they can do is orally to recommend an increase to the superintendent who, if he approves, passes the recommendation on to higher authorities. The recommendations of the foremen are not always accepted. Only the general manager can grant an increase. If he denies it, the union may then take up the matter as a grievance through the regular procedure outlined in the preceding paragraph.

Supervision of the Foreman

The foremen here involved are on the lowest rung of the supervisory ladder. They are subordinate to, and under the immediate supervision of, the superintendents, assistant superintendents or supervisors who, in their turn, have a manager or production manager over them. In ultimate charge of the Dunkirk plant is the general manager and an assistant general manger who, in turn, are responsible to officials in the Company's main office. The general manager has the final authority on promotions and demotions of foremen.

No one is hired from the outside as a foreman. All foremen are taken by promotion from among the rank and file employees. Indeed, the contract between the Company and the union representing the rank and file employees specifically provides that "in all cases of promotion, demotion and increase or decrease of forces, length of service and ability to perform the work shall be determining factors."[1]

If new foremen are unsatisfactory or if business falls off, they are demoted to their former positions as rank and file employees. The seniority of an employee so demoted accumulates during his tenure as a foreman and he receives, its benefit upon again becoming a rank and file employee. Thus, the fact that the rank and file employees are represented by a union seems to offer no obstacle to the promotion by the Company of some of them to the position of foreman.

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[1] Board's Exhibit No. 16 in Evidence, #6, p. 18.

From all the evidence we find that the foremen, shift foremen, general foremen and general shift foremen employed by the Company at its Dunkirk plant are "employees" of the Company within the meaning of Section 701, subdivision 3, of the Act.

[fol. 31] III. The Union

Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection. Its membership is limited to foremen. It excludes from membership any "foreman or supervisor, who is an employer of labor, or individual in a position to act as negotiator in the interests of employer policy."

The Foremen's Association of America is not affiliated with any other labor organization and has no connection with the United Steelworkers of America, C. I. O., which represents the rank and file employees. The Association has about 22,000 members. While at present the Association has no signed collective bargaining contracts with any employer, it has had, and continues to have, collective bargaining relations with various companies, but not with Allegheny Ludlum Steel Corporation.

IV. The Jurisdiction of the Board

The Company asserts that the Board has no jurisdiction in the instant case because of alleged conflict between the National Labor Relations Board and the New York State Labor Relations Board on the question of whether or not supervisory employees may constitute a unit appropriate for the purposes of collective bargaining.

The Company's argument in substance runs as follows: The Company is engaged in interstate commerce and is amenable to control by the Federal Government. Congress, through its power to regulate interstate commerce, has "assumed control" of the field here involved, by enacting the National Labor Relations Act (U. S. Code, Title 29, ch. 27). In turn, the National Labor Relations Board has "assumed juridiction" of the dispute here in question in that it has decided that units of supervisory employees are

not appropriate for purposes of collective bargaining (*Matter of The Maryland Drydock Company*, 49 N. L. R. B. 733, and other similar cases). In addition, the Company refers to Section 715 of the New York State Labor Relations Act which provides in apposite part as follow:

> "The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the Board that such employees are subject to and protected by the provisions of the national labor relations act * * *"

It claims that it has offered to enter into an agreement such as that contemplated by the provision but the Board has declined the Company's offer. The nature of the Company's offer and the reasons for the Board's rejection of it appear hereafter. The Company concludes that the question or controversy here involved comes under the sole jurisdiction of the National Labor Relations Board, and, therefore, the State Board may not act.

The Board cannot agree with either the reasoning employed or the conclusion reached by the Company.

The Constitutional Basis for the Act

It cannot be denied that under the Constitution of the United States the several states have plenary power and full sovereignty, except as to those things expressly denied to them, or granted to the Federal Government,[2]

[fol. 32] Nor can it be denied that one the principal attributes of sovereignty reserved to the states is the police power which the state may employ to maintain peace and order among persons located and businesses operated within its confines.

The State of New York has exercised its police power in regard to industrial and labor relations within the borders of the State by the passage of the New York State Labor Relations Act, Article 20 of the Labor Law. In Section 700 of the Act, the Legislature has made its findings of fact and declaration of the public policy of the State. This section reads in part:

> "When some employers deny the right of employees to full freedom of association and organization, and

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[2] U. S. Constitution, Amend. X.

refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health."

Accordingly, the Legislature, codifying the common law rights of employes within the State, provided in Section 703 of the Act:

"Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection . . ."

These rights have now been made a part of the Constitution of the State. Article I, Section 17, of the New York State Constitution provides:

"Employees shall have the right to bargain collectively through representatives of their own choosing."

In order to facilitate the exercise of these constitutional, statutory and common law rights, and to maintain industrial peace within the State, the Legislature, by Article 20 of the Labor Law, has established the New York State Labor Relations Board and has provided in Section 705 (2) of the Act:

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or any other unit . . ."

Absence of Conflict Between Federal and State Law

It is clear that the mere existence of the National Labor Relations Act does not prevent the State from regulating the industrial and labor relations of employers and employees located within the State, even though that regula-

tion may indirectly affect interstate commerce. The power of the Federal Government and of the State Government, so long as there is no conflict between them, is concurrent.[3] The purposes of the National Labor Relations Act and the New York State Labor Relations Act are similar; the very language of the two Acts is almost identical.[4]

[fol. 33] Both Boards are empowered to decide "in each case", what unit is appropriate for purposes of collective bargaining.[5] Thus, it is not contended here, because it cannot be so contended, that the two Acts are in conflict; the only asserted "conflict" is said to be in the action of the two Boards. In the instant case, the fact is that there is no such "conflict".

The National Labor Relations Board has not taken jurisdiction of the particular question or controversy involved in the instant case. No petition involving the foremen employed at the Company's Dunkirk plant has been filed with the National Labor Relations Board by either the Union or the Company. Indeed, a letter from the Buffalo Regional Attorney of the National Labor Relations Board to the Buffalo Regional Attorney of the New York State Labor Relations Board has been received in evidence, advising that such a petition would be dismissed by the National Board.[6] The sole action taken by the National Labor Relations Board affecting the Company's Dunkirk plant concerned only the rank and file employees. There, after an election, the National Board certified the Steel Workers Organizing Committee, C. I. O., as the exclusive bargaining representative of the rank and file employees, following which a collective bargaining contract was entered into between that labor organization and the Company. But the foremen at the Dunkirk plant were in no way involved in that proceeding, or any other before the National Board.

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[3] *Davega City Radio, Inc. v. Boland, et al.*, 281 N. Y. 13; *Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board*, 315 U. S. 740.

[4] *Davega City Radio, Inc. v. Boland, et al.*, 281 N. Y. 13, 22; *N. Y. S. L. R. B. v. Timen*, 264 A. D. 120, 122; *N. Y. S. L. R. B. v. Interborough News Co.*, 170 Misc. 347, 348.

[5] National Labor Relations Act, Sec. 9(b); New York State Labor Relations Act, Sec. 705(2).

[6] Board's Exhibit 7.

In many cases, commencing with *Matter of The Maryland Drydock Company* 49 N. L. R. B. 733, the National Labor Relations Board, while holding that foremen are "employees" within the meaning of the National Act, has declined to certify units composed of foremen or other employees with supervisory duties as appropriate for purposes of collective bargaining. In other cases, the National Board has made exceptions to this doctrine and has certified units of foremen as appropriate for bargaining, as where there has been a history of bargaining by foremen in the particular industry.[7] In the recent case of *Matter of Soss Manufacturing Company, etc.*, N. L. R. B. —, 14 L. R. R. 325 (May 8, 1944), the National Board, although deciding that foremen may not be discharged because of their union membership, reaffirmed its holding in *The Maryland Drydock* case, supra. Accordingly, except as above noted, the National Labor Relations Board will not entertain petitions for units of foremen; it will not certify as appropriate a unit of foremen; and it will not order an employer to bargain with a unit of foremen. So far as collective bargaining is concerned, the situation is exactly the same as if the National Labor Relations Act exempted foremen, like agricultural workers,[8] from its coverage. Certainly, in the absence of federal regulation of the particular field, the State is, at the least, free to make its own regulations to govern the relationship between foremen and their employers located within the State.[9] Surely, too, there is ample reason for such regulation when a denial of resort to the peaceful machinery of the State Act may force foremen to invoke lawful economic measures to achieve collective recognition.

[fol. 34] The issue in the present case is whether foremen may constitute an appropriate bargaining unit. This is a question of fact, and the Board's finding in that connection is merely a finding of fact.[10] Thus, even assuming, argu-

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[7] *Matter of W. F. Hall Printing Co.*, 51 N. L. R. B. 640; *Matter of Leo Lichtenstein, et al (Harlich Manufacturing* Company), 55 N. L. R. B. No. 259, 14 L. R. R. 300 (April 19, 1944).

[8] National Labor Relations Act, Section 2, subdivision 3.

[9] See cases cited in footnote No. 3, supra.

[10] *Metropolitan Life Insurance Company v. N. Y. S. L. R. B.*, 280 N. Y. 194, 208-9.

endo, that the foremen here involved had been before the National Board, the possibility of different fact findings on the same record by the National and the State Boards does not create a conflict of jurisdiction between them.[11] Reasonable men may differ over the issues involved in determining an appropriate unit, for example, whether it should include a whole plant or be limited to a single department or craft. Surely the State Board is not powerless to make a finding on this question in every case because of the possibility that the National Board on the same record might make a different finding of fact. It is the ultimate orders of the two Boards, and not their fact findings on the question of appropriate unit, that are material. Unless there is conflict between their final orders, unless the one orders what the other prohibits, there is no conflict between them.

While the National Labor Relations Board itself will not affirmatively order an employer to bargain with a unit of foremen, it certainly will not order the employer *not* to bargain with the representatives chosen by such a unit. Neither the National Labor Relations Board nor anything in the National Labor Relations Act or any other federal law prohibits an employer and a union representing a unit of foremen from bargaining. This is made clear by the National Labor Relations Board itself in its recent decision in *Matter of Soss Manufacturing Company, etc.*, N L. R. B. —, 14, L. R. R. 325 (May 8, 1944), where the Board said:

> "Moreover, our opinion in that case (Maryland Drydock, supra) did not illegalize collective bargaining outside the framework of the [National Labor Relations] Act for the supervisors' organizations. An employer, should he be so disposed, may still elect with legal immunity voluntarily to bargain with the labor organization composed of supervisors, provided that such bargaining does not also have the effect of interfering with the protected rights of other employees. It is true that in the Maryland Drydock case the Board announced that (full benefit of their [the employees'] right to self-organization and to collective bargaining, would not be insured were an employer subject to an

[11] *Allen-Bradley Local, etc., v. Wisconsin Employment Relations Board*, 315 U. S. 740, 745-6.

order to bargain with employee supervisor groups. But it is quite another matter to say that this holding created a prohibition against voluntary recognition and the establishment of collective bargaining relationships by mutual agreement between employers and supervisory employees."

It is thus obvious that if the State Board finds that, within the meaning of the State Act, the foremen here involved constitute an appropriate bargaining unit, and if the State Board further orders the Company, pursuant to Sections 704(6) and 706 of the State Act, to bargain with the duly selected representatives of these foremen, such action would not be in conflict with anything that would be ordered or prohibited by the National Labor Relations Board. Collective bargaining "outside the framework" of the National Labor Relations Act is not made illegal by any federal law, rule, regulation or order. An employer [fol. 35]may bargain with the representatives of his supervisory employees "with legal immunity" under the Federal law. Such bargaining with the representative of the foremen in the instant casefi assuming that the petitioning Union is duly selected by the employees in the election directed herewith, would not interfere with the "protected rights" of the rank and file employees at the Company's Dunkirk plant. The petitioning Union is an unaffiliated labor organization which rank and file employees are not eligible to join, and it has no connection of any kind with the labor organization presently representing the rank and file employees at the Company's Dunkirk plant.

We therefore find that there is no conflict between any order which the New York State Labor Relations Board ultimately may issue directed to the Company, and any Federal law, rule, regulation or order.

Section 715 of the Act Does Not Deprive the Board of Jurisdiction

Section 715 of the State Act reads in part:

"The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and

protected by the provisions of the national labor relations act. . . ."

The Company asserts that this provision deprives the Board of jurisdiction in the instant case. That contention was emphatically rejected by the Court of Appeals in *Davega City Radio, Inc. v. Boland, et al.*, 281 N. Y. 13, where the Court said at p. 25:

> "Appellant contends that since its employees are protected by the National Act, the State law, because of the above provision, does not apply. Such is not the language of the statute. It does not exempt from its jurisdiction all who are subject to the National Act but only those as to whom the employer and the Board agree are subject to the National Act. In the case at bar the Board has not agreed with the employer that the latter is subject to the National Labor Relations Act. Hence, appellant is not exempted by the operation of this section."

And so in the instant case, the Board has declined to agree with the Company that as to collective bargaining by the foremen at its Dunkirk plant, the Company is subject to the National Labor Relations Act. It is obvious that so far as collective bargaining is concerned, the foremen here involved are not "protected" by the provisions of the National Act. Indeed, when the Company sought to invoke the consent provision of Section 715 it by no means offered to agree that its *foremen* at the Dunkirk plant were "protected" by the National Act. And it is very doubtful that even if it did so offer, it could thereby confer jurisdiction on a National Board which might decline it.

Upon the entire record, we find that the New York State Labor Relations Board has jurisdiction of the question or controversy hereinafter found to exist between the Company and the Union concerning the representation of the foremen employed by the Company at its Dunkirk, N. Y., plant.

V. The Question or Controversy Concerning Representation

The Company and the Union disagree as to whether supervisory employees may constitute an appropriate bargaining unit. Further, the Company declines to re-

cognize the Union as the collective bargaining representative of its employees in any unit. We therefore find that a question or controversy exists concerning the repre- [fol. 36] sentation of foremen at the Company's plant located at Dunkirk, N. Y.

This question or controversy may lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare and endanger the public health of the people of the State of New York. The exercise of the police power of the State of New York in relation to this question or controversy is necessary for the protection of the public welfare, prosperity, health and peace of the people of the State of New York. The Board is fully conscious of the industrial unrest that would follow from a failure to afford the employees here involved access to the peaceful machinery of the Board. Moreover, the Board is mindful of the fact that a denial of resort to the Act may constitute a denial of these employees' constitutional rights.[12]

VI The Appropriate Unit

The Union asks the Board to find that the foremen, shift foremen, general foremen and general shift foremen employed by the Company at its Dunkirk plant constitute a unit appropriate for the purposes of collective bargaining. The Company, while conceding that these classifications of employees are "employees" within the meaning of Section 701, subdivision 3, of the Act, contends that they cannot constitute an appropriate unit because of the supervisory nature of their duties.

As noted above, the foremen here involved are on the lowest rung of the supervisory ladder. They are the immediate supervisors above the rank and file workers. In turn, there are several strata of supervision above the foremen; supervisors, assistant superintendents, superintendents or shift superintendents, manager or production manager, assistant general manager, general manager, and still higher officials at the main office. It is conceded that these foremen have no executive responsibilities, do not participate in the formulation of managerial policies, and do not negotiate on behalf of the Company or participate in collective bargaining between the Company and the rank

[12] Art. I, §17, of the New York State Constitution, supra.

and file employees. They have no financial interest in the Company.

The Board has considered the status of employees with like supervisory duties in several previous cases and has determined that they may be included in a bargaining unit limited to employees similarly situated. For the Board's rationale, reference is made to our prior decisions in *Matter of Williamsburgh Power Plant Corp.*, 1 S. L. R. B. 653 (1938); *Matter of Siegel & Fried, Inc.*, 3 S. L. R. B. 150 (1940); *Matter of Rexton Realty Company*, 4 S. L. R. B. 1180 (1941); *Matter of Bee Line, Inc.*, Dec. No. 2579, 6 S. L. R. B. —— (1943); *Matter of Metropolitan Life Insurance Company, etc.*, Dec. No. 2591, 6 S. L. R. B. —— (1943); *Matter of Delparke Realty Corporation, etc.*, Dec. No. 2643, 6 S. L. R. B. —— (1943).

In *Matter of Bee Line, Inc.*, supra, where the facts were similar to those in the instant case, the Board said:

> "When the other criteria for constituting an appropriate bargaining unit are met, the Board cannot find that the unit requested is inappropriate solely because the employees within it perform some supervisory tasks. In effect this denies them all bargaining rights under the Act. According to Section 705, subdivision 2 of the Act, the purpose of establishing an appropriate unit is to insure employees the full benefit of their right to selforganization and to collective bargaining, and otherwise to effectuate the policies of the Act. This [fol. 37] contemplates that the Board shall establish that unit as appropriate which will best achieve those ends. The concept of appropriate unit is an affirmative one, intended to bring about the most desirable form of organization. It is not a negative concept to be used as a means of denying all bargaining rights under the Act to a given group of employees in all circumstances. Once it is determined that a group of persons are employees, they have a right under the Act and the Constitution of the State of New York to be placed in some appropriate unit—that one which will best facilitate their participation in the practice and procedure of collective bargaining."

Upon the entire record, we find that in order to insure the employees concerned the full benefit of their right to

self-organization, to collective bargaining, to promote industrial peace within the State, and otherwise to effectuate the policies of the Act, the foremen, shift foremen, general foremen and general shift foremen employed by the Company at its Dunkirk plant constitute a unit appropriate for the purposes of collective bargaining. The general manager, assistant general manager, production manager, manager, superintendents, shift superintendents, assistant superintendents and supervisors * will be excluded from the bargaining unit. The company did not challenge the appropriateness of this unit, apart from its contention that supervisory employees may not constitute a bargaining unit.

VII. *The Evidence Concerning Representation*

Of the approximately 46 foremen within the appropriate unit, the Union presented 35 cards applying for membership in the Union, the signatures of which compared favorably with those on pay checks submitted by the Company. The Union also presented a petition signed by this same group of employees requesting that the Union be recognized as the sole bargaining agency for the employees within the appropriate unit, in regard to wages, hours and conditions of employment. However, the Company does not concede that the Union represents a majority of the employees within the appropriate unit. We, therefore, find that an election by secret ballot is necessary to determine their present desires. In accordance with our usual procedure, eligibility to vote in the election will be determined by the payroll dates immediately preceding the date of this Decision and Direction of Election.

Conclusions of Law

Upon the foregoing Findings of Fact and upon the entire record of this proceeding, the Board finds and concludes as a matter of law:

1. Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, is a labor organization within the meaning of Section 701, subdivision 5, of the Act.

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*As shown on the Company's organization chart (Board's Exhibit 14).

2. The foremen, shift foremen, general foremen and general shift foremen employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant are employees within the meaning of Section 701, subdivision 3, of the Act.

[fol. 38] 3. Allegheny Ludlum Steel Corporation is an employer of the employees described in paragraph "2" above, within the meaning of Section 701, subdivision 2, of the Act.

4. A question or controversy has arisen concerning the representation for the purposes of collective bargaining of the foremen, shift foremen, general foremen and general shift foremen employed by Allegheny Ludlum Steel Corportation at its Dunkirk, N. Y., plant within the meaning of Section 705, subdivision 3, of the Act.

5. The New York State Labor Relations Board has jurisdiction of the question or controversy mentioned in paragraph "4" above, within the meaning of Section 705 of the Act.

6. The question or controversy mentioned in paragraph "4" above, may lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and endanger the public health of the people of the State of New York, within the meaning of Section 700 of the Act.

7. The National Labor Relations Board has not taken jurisdiction of the question or controversy mentioned in paragraph "4" above, within the meaning of the National Labor Relations Act.

8. The New York State Labor Relations Board has not agreed with Allegheny Ludlum Steel Corporation that the foremen, shift foremen, general foremen and general shift foremen employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant are subject to and protected by the provisions of the National Labor Relations Act, within the meaning of Section 715 of the New York State Labor Relations Act.

9. The foremen, shift foremen, general foremen and general shift foremen (excluding the general manager, assistant general manager, production manager, manager, super-

intendents, shift superintendents, assistant superintendents and supervisors*) employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 705, subdivision 2, of the Act.

DIRECTION OF ELECTION

By virtue of and pursuant to the powers vested in the New York State Labor Relations Board *of* Section 705 of the New York State Labor Relations Act, it is hereby

Directed, that, as part of the investigation authorized by the Board, an election by secret ballot shall be conducted within thirty (30) days from the date hereof, under the supervision of the Board or its agents, at a time, place and during hours to be fixed by the Board, among the foremen, shift foremen, general foremen, and general shift foremen (excluding the general manager, assistant general manager, production manager, manager, superintendents, shift superintendents, assistant superintendents and supervisors *) employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant, during the payroll period immediately preceding the date of this Direction of Election (other than those who have voluntarily quit or have been discharged for cause) to determine whether or not they desire to be represented by Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58 for the purposes of collective bargaining concerning rates of pay, wages, hours and other terms and conditions of employment.

[fol. 39] Rev. William J. Kelley, O. M. I., Chairman (Seal), H. Myron Lewis, Member.

Dated: New York, N. Y. May 24, 1944.

To: Allegheny Ludlum Steel Corporation (R), Howard Avenue, Dunkirk, N. Y.; Smith, Buchanan & Ingersoll, Esqs., 1025 Union Trust Building, Pittsburgh, Pa.; Moot, Sprague, Marcy & Gulick, Esqs., 302 Erie County Savings Bank Building, Buffalo 2, N. Y.; Foremen's Association of America (R), 515 Barlum Tower, Detroit 26, Mich.; Walter

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*As shown on the Company's organization chart (Board's Exhibit 14).

M. Nelson, Esq., 1438 Dime Building, Detroit 26, Mich.; American Federation of Labor (R), 311 White Building, Buffalo, N. Y.; Foremen's Association of America: Allegheny Ludlum Steel Corporation Chapter No. 58 (R), 29 Howard Avenue, Dunkirk, N. Y.

[fol. 40] *Duly sworn to by H. Myron Lewis. Jurat omitted in printing.*

[fol. 41] AFFIDAVIT OF SERVICE BY MAIL

State of New York, City of New York, County of New York, ss:

Lillian Schwartz, being duly sworn, deposes and says that she is a clerk in the office of Daniel Kornblum the attorney for the above named defendants herein. That on the 24th day of May 1944 she served the within Amended Answer upon Moot, Sprague, Marcy & Gulick, Esqs., the attorneys for the within named plaintiff by depositing a true copy of the same securely enclosed in a postpaid wrapper marked Registered-Special Delivery, R. R. R. in a Branch Post-Office maintained by the United States Government at 10 West 60 St. (Columbus Circle Station) in said County of New York directed to said attorneys for the plaintiff at No. 302 Erie County Savings Bank Bldg., Buffalo 2, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action, as the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of twenty-one years.

Sworn to before me this 25th day of May, 1944.

Lillian Schwartz, William J. Peterson, Notary Public, Queens Co. No. 1627.

[fol. 42] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

NOTICE OF MOTION

SIRS:

Please Take Notice that upon the complaint and amended answer in this action the undersigned will move this Court, at a Special Term for motions, to be held at the County Court House, Mayville, in the County of Chautauqua, State of New York, on the 13th day of June, 1944, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, pursuant to Section 476 of the Civil Practice Act and Rule 112 of the Rules of Civil Practice, for an order granting judgment dismissing the complaint on the ground that on the face of the pleadings herein the defendants are entitled to the relief requested in their amended answer, and on the ground that the complaint does not state facts sufficient to constitute a cause of action, and for such other, further and different relief as to this Court may seem just and proper, together with the costs of this motion and of this action;

Please Take Further Notice that upon the complaint and amended answer herein, the annexed affidavit of H. Myron Lewis, sworn to the 31st day of May, 1944, and the annexed affidavit of Ernest E. Cavagnaro, sworn to the 31st day of May, 1944, the undersigned will move this Court at the same time and place, pursuant to Rule 113 of the Rules of Civil Practice for an order dismissing the complaint herein and directing that judgment to that effect be entered herein in favor of the defendants on the ground that the action has no merit, and for such other, further [fol 43] and different relief as to the Court may seem just and proper together with the costs of this motion and of this action.

Dated: New York, N. Y. June 2, 1944.

Yours, etc., Daniel Kornblum, Attorney for Defendants. Office and P. O. Address, 250 West 57th Street, Borough of Manhattan 19, City of New York.

To: Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiff. Office & P. O. Address, 302 Erie County Savings Bank Building, Buffalo 2, New York.

[fol. 44] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

AFFIDAVIT OF H. MYRON LEWIS—Filed October 3, 1944

STATE OF NEW YORK,
City of New York,
County of New York ss:

H. Myron Lewis, being duly sworn, deposes and says:
I am one of the defendants herein and a Member of the New York State Labor Relations Board.

1. This affidavit is respectfully submitted in support of the Board's motion, pursuant to Rule 113 of the Rules of Civil Practice, for summary judgment dismissing the complaint.

2. This action was commenced by service of a summons and verified complaint on April 14, 1944. On May 24, 1944 a verified amended answer was duly served.

3. In a proceeding entitled "In the Matter of Allegheny Ludlum Stee' Corporation—and—Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58," case number WE-373 on the records of the Board, the Board on May 24, 1944 duly issued and served its Decision and Direction of Election. The Decision and Direction of Election are annexed to, and made part of, the Board's amended answer.

4. The direction of election does not order or require the plaintiff to do or refrain from doing anything, as reference to page 12 thereof will show.

[fol. 45] Jurisdiction

5. Plaintiff, in this action, seeks a declaratory judgment that the Board may not hold the projected election, on the ground that the National Labor Relations Board has assumed jurisdiction over such matters, that its jurisdiction is exclusive and, therefore, that the defendant Board has no jurisdiction to proceed.

6. It is the fact, as alleged in the fifth and sixth affirmative defenses at pages 6 and 7 of the Board's amended

answer herein, that no petition alleging that a question or controversy exists as to representation for the purposes of collective bargaining of foremen employed at plaintiff's plant at Dunkirk, New York, or requesting the National Labor Relations Board to investigate and certify the union as collective bargaining representative of such foremen has been filed with the National Labor Relations Board. Nor has the National Labor Relations Board assumed or asserted jurisdiction of any alleged question or controversy concerning representation of such foremen at plaintiff's plant, or of any request that the union be certified as representative for purposes of collective bargaining of such foremen. No proceeding as to such foremen at plaintiff's plant is pending before the National Labor Relations Board.

7. Indeed on February 21, 1944 we inquired as to whether any such petition had been filed with the National Labor Relations Board. By letter dated February 22, 1944, we were told by the Regional Director of the National Board at Buffalo, M. S. Ryder, Esq., that not only had no petition as to plaintiff's foremen at Dunkirk been filed, but that under the National Board's policy, the petition would not have been entertained. A copy of that letter is hereto annexed and marked Exhibit "A".

Harmonious Relations

8. Plaintiff's unparticularized allegations that if the projected election is held it will "destroy the harmonious relations between plaintiff and its supervisory employees" [fol. 46] and will "defeat the purpose of the Act by causing instead of preventing labor disputes," are wholly without substance and unfounded (Complaint, para. 19).

9. Contrary to widespread misconception, the Act does not create or confer the right to organize or to strike. Those rights existed at common law. The fact is that the Act's peaceful election machinery is designed to obviate the necessity for the use of strikes to compel union recognition, by substituting the ballot box for the picket line.

10. Sound relations between plaintiff and its foremen are dependent on both plaintiff and its employees knowing what the situation actually is. The basic important fact, and one which as yet has not been determined, is whether or not a majority of the foremen do or do not wish to be repre-

sented by the union. That question can only be answered peacefully by an election by secret ballot conducted by the Board.

11. Such an election cannot but clarify the situation. If the union is not designated by a majority of the voters, that is the end of the matter. If it is designated, then the Board will certify that fact. It cannot be seriously contended that substitution of knowledge arrived at by peaceable means, in place of doubt, "destroys the harmonious relations between plaintiff and its supervisory employees."

12. Indeed the peaceful election process furnishes the best guarantee of the continuance of harmonious relations. If, in fact, a majority of the foremen do wish to be represented by the union but are blocked by plaintiff from an opportunity to cast ballots to demonstrate that fact, then the only means left to the foremen of demonstrating that fact to the reluctant plaintiff is the use of economic pressure. And as we know from experience the economic weapon most likely to be adopted in situations where an employer withholds union recognition, is the strike. That [fol. 47] is the very danger which the Legislature recognized and sought to avoid when it enacted Article 20 of the Labor Law. Experience has amply demonstrated the wisdom of the enactment.

Irreparable Injury

13. Plaintiff's assertion that it will suffer irreparable injury if this election is held is similarly without substance (Complaint, para. 20).

14. As I have pointed out if the union is not chosen in the election, that is the end of the matter. If, on the other hand, the union is chosen, the Board certifies that fact. No order is made directing the plaintiff to take or refrain from taking any action. Plaintiff, however, would be under the duty to deal in good faith with the union as to the wages, hours and working conditions of the foremen (Act. Sec. 705). That, on elementary principles, does not constitute damage or injury.

15. If, thereafter, the Board should issue a complaint alleging that plaintiff had failed to meet its statutory duty

to deal in good faith, the fact that plaintiff has the right to interpose an answer to such a complaint and appear at hearings on the issues thus defined, offer evidence, examine and cross-examine witnesses and receive full opportunity to be heard, does not constitute damage or injury. It has long been well settled that the necessity of defending an administrative proceeding does not constitute damage or injury.

16. Even if the Board ultimately issues an order directing plaintiff to deal with the union, that order would not be self-enforcing. Before plaintiff could be compelled to obey the Board's order, the Board would have to apply to this Court under Section 707 of the Act for an order of Court directing plaintiff to obey the Board's order. Plaintiff could oppose the Board's application or could itself apply to this Court for an order vacating the Board's order. *The propriety of the Board's direction of election which plaintiff now attacks, as well as of any future Board* [fol. 48] *order directing the plaintiff to deal with the union, would then be presented directly to this Court for review on the complete record of proceedings before the Board including the proceedings to date. That review would by statute bring up for determination all the issues which plaintiff seeks to raise in this action.* It is well settled, moreover, that the method of review which I have just outlined is the exclusive method of review of Board action provided by law. Clearly then no legally cognizable damage can possibly result to plaintiff by the holding of an election.

Conclusion

17. I believe that this action is wholly without merit, I respectfully submit that an order should be made pursuant to Rule 113 of the Rules of Civil Practice dismissing the complaint and directing that judgment to that effect be entered in favor of the defendants.

H. Myron Lewis.

Sworn to before me this 31st day of May, 1944. Helen S. Hoffer, Commissioner of Deeds, New York City, N. Y. Co. Clks. No. 15; Reg. No. 5H16 Kings Co. Clks. No. 3; Reg. No. 5H13. Commission expires 1/19/45.

[fol. 49] EXHIBIT "A"

National Labor Relations Board

Third Region Genesee Building Buffalo, New York

February 22, 1944

Ernest E. Cavagnaro, Regional Attorney, New York State Labor Relations Board, Western Region, State Office Building, Buffalo 2, New York.

DEAR MR. CAVAGNARO:

This is in acknowledgment and reply to your letter dated February 21, 1944.

Our records reveal that the Foreman's Association of American, Allegheny Ludlum Steel Corporation Chapter No. 58 has made no request of this office nor has filed any petition seeking certification as bargaining representative for a unit consisting of foremen or any other supervisory employees employed by the Allegheny Ludlum Steel Corporation at its Dunkirk, New York plant.

Under present policy, as originally enunciated by the National Labor Relations Board in the Maryland Drydock Company cases R-5212 and R-5214, and elaborated upon in subsequent decisions our Board will not proceed to certify a labor organization as bargaining agent for a unit composed of, or including, foremen, assistant foremen, and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action. The Board has made two exceptions to this policy with respect to supervisory employees in the maritime and printing trades.

Therefore, in view of the above, it is my opinion that in the event the Foreman's Association of America had filed a petition seeking certification for foremen as a separate bargaining unit, in light of present Board policy, this office would have refused to issue notice of hearing. In other words, the petition would have been dismissed.

Very truly yours,

(Signed) M. S. Ryder, Regional Director.

MSR/c

[fol. 50] IN SUPREME COURT OF NEW YORK, CHAUTAUQUA COUNTY

[Title omitted]

AFFIDAVIT OF ERNEST E. CAVAGNARO

State of New York,
County of Erie,
City of Buffalo, ss:

Ernest E. Cavagnaro, being duly sworn, deposes and says: That he resides at 107 Capen Blvd., in the City of Buffalo, Erie County, New York.

That he is the Regional Attorney for the New York State Labor Relations Board in charge of the Western Regional Office, located in the State Office Building in the City of Buffalo, Erie County, New York.

That the Dunkirk plant of the Allegheny Ludlum Steel Corporation is situate in the Third Region of the National Labor Relations Board.

That on May 31, 1944, the deponent examined the records of the National Labor Relations Board at its Regional Office for the Third Region, 714 Genesee Building in the City of Buffalo, Erie County, New York, and at that time talked with Peter J. Crotty, Regional Attorney for said Board, who was then in charge of the said Regional Office.

That the deponent states no petition for investigation and certification of representatives for collective bargaining purposes of foremen, shift foremen, general foremen or general shift foremen, employed by the Allegheny Ludlum Steel Corporation at its Dunkirk, New York, plant, has been filed or is pending with the National Labor Relations Board.

[fol. 51] Ernest E. Cavagnaro.

Sworn to before me this 31st day of May, 1944.
Rita A. Kenney, Commissioner of Deeds, Buffalo, New York.

Endorsed Personal Service of the within affidavit and Notice of Motion is hereby admitted this 2nd day of June, 1944.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff.

[fol. 52] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

[Title omitted]

AFFIDAVIT OF STANLEY A. MCCASKEY, JR.—Filed October 3, 1944

State of New York,
County of Erie,
City of Buffalo, ss:

Stanley A. McCaskey, Jr., being duly sworn, deposes and says:

That I am an officer, to wit, Assistant Secretary of The Allegheny Ludlum Steel Corporation, a Pennsylvania corporation duly licensed to do business in New York, and the plaintiff in this action.

1. This affidavit is respectfully submitted in opposition of the motion of defendants pursuant to Rule 113 of the Rules of Civil Practice for summary judgment dismissing the complaint.

2. In a proceeding entitled "In the Matter of The Allegheny Ludlum Steel Corporation—and—Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58," Case No. WE 373 on the records of the Board, in which proceeding plaintiff was named as a party and has appeared specially, the State Labor Relations Board, hereinafter called the State Board, issued and served its decision and direction of election which has been annexed to and made a part of the State's amended answer herein.

2a. Upon information and belief, that thereafter and on or about June 21, 1944, pursuant to said direction of election an election was held to determine whether the foremen at plaintiff's Howard Avenue and Brigham Road plants in Dunkirk, New York desired to be represented by Foremen's Association of America, Allegheny Ludlum Steel Corpora-
[fol. 53] tion Chapter No. 58 for the purpose of collective bargaining.

3. That following such election Ernest E. Cavagnaro, Esq., Regional Attorney for the State Board, found that the majority of eligible foremen who voted in said election chose the said Union to be their representative.

4. That deponent is informed by attorneys for plaintiff, and believes, that if the aforementioned proceedings before the said State Board are valid and within the power of the said State Board plaintiff will be guilty of unfair labor practices if it refuses to bargain in good faith with said Union or to discuss the grievances of the foremen with the Union representative.

5. That this action was commenced by the service of a summons and verified complaint on April 14, 1944 demanding, among other relief, that the court declare that the State Labor Relations Board has no jurisdiction to determine the bargaining representative of plaintiff's said foremen. That a verified amended answer was served on May 24, 1944.

Jurisdiction

6. That The Allegheny Ludlum Steel Corporation is a nationwide organization doing a large volume of business in interstate commerce. That the State Labor Relations Board in its said decision, referring to paragraph 2 hereof found as follows:

> "About 95%, by value, of the products produced at the Dunkirk plant are shipped to points outside of New York State. About 86%, by value, of the raw materials used at the Dunkirk plant are brought from points outside New York State. About 85%, by value, of partially fabricated materials are brought to the Dunkirk plant from points outside New York State for further fabrication. The Union concedes that the Company is engaged in interstate commerce."

7. That the rank and file employees of the said Dunkirk plants of the plaintiff are represented by the Steel Workers Organizing Committee, C. I. O., which has been certified as the bargaining representative for the said employees following a proceeding entitled "Matter of Allegheny Ludlum [fol. 54] Steel Corporation and Steel Workers Organizing Committee, Case No. III-R-411 before the National Labor Relations Board. That the said Steel Workers Organizing Committee, C. I. O. is a part of a national labor organization.

8. That deponent is informed by plaintiff's attorneys and believes that the National Labor Relations Board has

made determinations in various cases duly presented for its determination that foremen such as the members of Allegheny Ludlum Chapter No. 58, Foremen's Association of America, are employees within the meaning of the National Labor Relations Act and are entitled to protection of the National Labor Relations Board as such employees.

NLRB v. Skinner and Kennedy Stationary Company, 113 F2d 667.

Soss Manufacturing Company and Foremen's Association of America, NLRB case No. 7-C-1148.

Republic Steel Corporation .98 Inch Strip Mill and Foremen's Association of America, Case No. 8-C-1569.

NLRB v. Richter's Bakery, 140 F 2d 870.

That the NLRB has in the last mentioned cases made orders protecting the rights of the foremen.

9. That the NLRB has nevertheless determined that a bargaining unit consisting of foremen is not an appropriate unit for collective bargaining and that it has in many cases decided that the policies and purposes of the National Labor Relations Act will not be furthered by the holding of elections to certify representatives for bargaining from such units.

Maryland Drydock Company cases 49 NLRB 733.

Murray Corporation of America (Ecorse Plant) and Murray Ecorse Supervisors Association, Case No. R-4731.

General Motors Corp., Detroit Diesel Engine Division, 51 NLRB #89, Jy. 20, 1943 Case #R 5289.

10. That in the Maryland Drydock cases petitions were filed by a foremen's union and were entertained by the National Board and after hearings upon said petitions the said Board refused to hold an election as requested in the hearing. That in subsequent cases similar hearings have been held and that in a few instances where existing custom [fol. 55] in the industry accorded, elections have been held in accordance with the petitions. See for example:

Jones & Laughlin Steel Corp. 51 N. L. R. B. #187 Case #R 4882.

Now pending before the Board are at least four cases in which Foremen's Association of America has filed petitions. Those four cases are

Bohn Aluminum & Brass Company, Case No. 7-C-1264

Republic Steel Corp., Case No. 8-C-1569

Willis-Overland Motors, Case No. 8-C-1623

American Steel Foundry Indiana Harbor Works, 13-C-2294

11. That deponent is also informed that there is nothing in the decisions of the said Board which indicates that foremen are not entitled to and have not been accorded the protection of the NLRA, but that on the contrary such protection has in every case where it has been sought been accorded to foremen insofar as the National Board has felt it to be consistent with the welfare of rank and file employees. That deponent makes reference to the decisions of the National Labor Relations Board hitherto referred to and the other decisions of the said Board dealing with the subjects of foremen's unions. For a complete and informative history of the policy of the National Labor Relations Board with regard to foremen's unions and the representative of supervisory employees, deponent respectfully refers the court to an opinion of Jesse Freidin, General Counsel of the War Labor Board, which was reported in Volume 3 CCH Labor Service Paragraph 15119.

12. Upon information and belief, the foremen employed in the steel industry have not heretofore by custom been represented by unions nor belonged to unions. That they have been specifically denied membership in those unions to which rank and file employees are admitted.

13. That deponent is informed by plaintiff's attorneys and believes by reason of the foregoing facts the State [fol. 56] Labor Relations Board of the State of New York had exceeded its power in the premises.

Irreparable Injury to Plaintiff

14. That plaintiff's relations with foremen employed at its Dunkirk plant have heretofore been harmonious and that no labor disputes have existed heretofore between plaintiff and its said foremen.

15. The foremen employed in plaintiff's said plants play an important part in conducting plaintiff's relations with its rank and file workers. That it is a part of the duty of the foremen to attempt to settle worker grievances. When foremen are unable to settle grievances, their recommendations are invariably sought by their superiors and are by them accorded great weight in arriving at a solution of the grievances. The recommendations of the foremen are also of great importance in connection with discipline, discharge and promotion. The foremen are engaged solely in supervising the labor of their employees.

16. The actions of a foreman are in some instances the subject of a grievance of the union representing the rank and file.

17. Deponent from his experience with labor relations believes that the unionization of foremen will tend to increase labor disputes in plants for the following reasons, among others:

a. In cases of disputes between the rank and file union and management in which the action of a foreman is the subject of dispute, settlement can be far less expeditious and the danger of crippling strikes will be increased if a foremen's union is recognized.

b. The number of jurisdictional disputes will be increased.

c. The plaintiff will be subjected to the increased risk of committing through partisan action by its foremen, for which under the N. L. R. A. it is held responsible, unfair labor practices when competing unions are seeking recognition within plaintiff's said plants.

d. Management has always been united with the foremen by a community of interest and a similarity of function. Their common cause has resulted in benefit to the rank and file and to the public since it has tended to simplify the issues between labor and management and has made the fixing of responsibility a [fol. 57] simple matter. The unionization of foremen will tend to divorce them for management and to make it more difficult for rank and file employees to fix the

responsibility for unfair labor practices and to adjust them.

18. Deponent believes that the recognition accorded the foremen's union by the State Board has resulted in the activation of an organization whose continued existence is a danger to the peaceful and harmonious relations which have heretofore existed between management and labor at its Dunkirk plant and that continued recognition by the State Board can but make the situation worse if, as deponent is informed and believes, defendants have acted upon their power and jurisdiction in conducting the said proceedings and in conflict with the policy of the N. L. R. B.

19. Deponent is informed and believes that a delay of months in determining the question of jurisdiction herein raised will be inevitable if deponent is forced to rely on the alleged remedy provided by Section 707 of the Labor Law of the State of New York and that such delay alone will endanger plaintiff's labor relations, since plaintiff, to protect its position that is not subject to the State Board must refuse to bargain with the said Union until the question of jurisdiction has been decided.

20. Deponent is informed and believes that before a review can be obtained pursuant to Section 707 of the Labor Law plaintiff must endanger its relations with its foremen by committing an act which the State Board would regard as unfair labor practices.

21. Deponent is informed and believes that petitions regarding its relations with its employees at its said Dunkirk plants may at any time be filed with the National Labor Relations Board and that so long as the State Board continues to assert jurisdiction of this and like disputes that deponent runs the risk of being ordered to take action which is contrary to the order and policy of the National Board and may by it be regarded as an unfair labor practice and that this will further imperil plaintiff's relations not only with the foremen's union but with the [fol. 58] union representing the rank and file.

22. Deponent believes that by reason of the foregoing fact incalculable damage will be caused plaintiff for which by its very nature there can be no adequate remedy whatever only by the prompt determination in this action.

That the State Board may not act with reference to plaintiff's supervisory employees will plaintiff's rights be protected and further damage to the plaintiff be prevented.

Stanley A. McCaskey Jr.

Subscribed and sworn to before me this 27th day of June, 1944. William G. Conable, Notary Public, Erie Co., N. Y.

[fol. 59] In Supreme Court of New York, County of Chautauqua.

[Title Omitted]

Reply Affidavit of H. Myron Lewis—Filed October 3, 1944

State of New York,
City of New York,
County of New York, ss:

H. Myron Lewis, being duly sworn deposes and says:

I am a Member of the defendant New York State Labor Relations Board and respectfully submit this affidavit in reply to the affidavit of Stanley A. McCaskey, Jr., sworn to June 27, 1944.

As to paragraphs 6 through 13.

1. Paragraphs 6 through 13 of Mr. McCaskey's affidavit show that plaintiff is not questioning the jurisdiction of the defendant Board to act "at all" in the premises, i. e., to entertain the petition concerning representation of plaintiff's foremen at its Dunkirk plant. On the contrary the affidavit makes it clear that by this action plaintiff is really seeking prematurely to review the defendant Board's finding of fact that plaintiff's foremen at its Dunkirk plant constitute an appropriate bargaining unit.

2. The discussion of the decisions of the National Board in the affidavit is inaccurate. On the one hand the National Board has afforded foremen protection against discharge because of union membership but on the other hand it has, in the Maryland Drydock case, overruled prior decisions and refused to continue to grant foremen access to the National Board's *election machinery for bargaining purposes*. But it is the fact that neither the National

Board nor the National Act prohibits foremen from organ-[fol. 60] izing and bargaining through representatives of their own choosing or prohibits employers from bargaining with foremens' representatives. Bargaining between the plaintiff and the union which its foremen at its Dunkirk plant have chosen can violate no Federal statute, rule, regulation or order.

As to paragraphs 14 through 22

3. Paragraph 14 through 22 of Mr. McCaskey's affidavit do not set forth a single fact constituting damage. The arguments are wholly speculative and are contradicted by the long and well known history of bargaining by foremen and other supervisory employees. The arguments advanced are the traditional arguments used years ago against rank and file employees joining unions. The fact, as contrasted with plaintiff's speculative forebodings, is that the defendant Board has certified bargaining units of foremen and supervisory employees ever since 1938. In not a single instance have consequences such as those plaintiff prophesies, resulted.

4. The situation at bar is actually a simple one. The Foremen's Association of America is an independent labor organization admitting only foremen to membership. It is not affiliated or in any way connected with United Steel Workers of America, C. I. O., which represents the rank and file employees of plaintiff's Dunkirk plant. Nor is it affiliated with the C. I. O., A. F. of L. or with any other group, national or otherwise. The Board on June 21, 1944, conducted an election by secret ballot among plaintiff's foremen. The vote was 36 to 3 in favor of representation by the Foremen's Association. On June 30, 1944, the Board certified the Association as bargaining representative of plaintiff's foremen.

5. Chief Justice Taft long ago pointed out that unions "were organized out of the necessity of the situation. A single employee was helpless in dealing with an employer. • • • Union was essential to give labor its opportunity [fol. 61] to deal in equality with their employer." (*American Steel Foundries* v. *Tri-City C. T. Counsel*, 257 U. S. 184, 208-9). It is a fair inference therefore, in view of the results of the election conducted by the defendant

Board that plaintiff's foremen at the Dunkirk plant, have decided, rightly or wrongly, that they can better their situation by union representation. Plaintiff's suggestion that the defendant Board "unionizes" foremen is wholly gratuitous. Joining or not joining a union rests with the foremen themselves. All the Board does is conduct an election by secret ballot and certify the fact which the balloting discloses.

6. Plaintiff argues that the defendant Board's action "has resulted in the activation of an organization whose continued existence is a danger to the peaceful and harmonious relations which have heretofore existed * * *" Even apart from the realistic comment of Chief Justice Taft quoted above, how can plaintiff consistently argue that "peaceful and harmonious relations" will be disturbed by permitting plaintiff's foremen to have recourse to the peaceful machinery of the State Labor Relations Act, but that "peaceful and harmonious relations" will continue if, by denial of such recourse, the foremen are left no alternative but to strike to compel recognition by plaintiff of the Foremen's Association.

7. Plaintiff argues that it would "be subjected to the increased risk of committing through partisan action by its foremen, for which under the N. L. R. A. it is held responsible, unfair labor practices when competing unions are seeking recognition * * *" The settled law furnishes a complete answer to that misgiving. Plaintiff would not be chargeable for the conduct of foremen towards foremen. Plaintiff can be chargeable only for the conduct of foremen towards rank and file employees. And that was so long before its foremen joined the Association.

8. Again, plaintiff says that the number of "jurisdictional disputes" will be increased. The statement is wholly unparticularized and unexplained. To have meaning it [fol. 62] would have to relate to a situation in which there is a dispute as to whether a given employee is a foreman or a rank and file employee. But such disputes can exist at present for, as the affidavit points out in paragraph 12, foremen are not eligible for membership in the C. I. O. union which represents plaintiff's rank and file employees. Recognition by plaintiff of the Foremen's Association which admits only foremen to membership, could preclude the

possibility of such disputes developing into problems, for agreement could be reached on over-all classification of employees.

9. Nor can certification of the Foremen's Association affect bargaining between plaintiff and the C. I. O. union representing plaintiff's rank and file employees. The Foremen's Association has been certified only as the representative of the foremen and could bargain only for foremen. It could not bargain for the rank and file employees who are already represented by another union, in no way affiliated with the Foremen's Association.

10. I respectfully emphasize that even assuming arguendo that plaintiff's speculative fears are justified, *the things it fears, flow not from any action by the defendant Board, but from the fact that plaintiff's foremen have decided to join a union.* They result from "the necessities of the situation," as Chief Justice Taft pointed out, not from anything that the defendant Board does or can do. All the defendant Board has done is to make available the peaceful machinery which the Legislature established, machinery which the Courts repeatedly have recognized was established to obviate the necessity for the use of economic pressure by employees to compel union recognition. It is the plaintiff alone that can aggravate the situation. In the words of Chief Justice Hughes (*N. L. R. B. v. Jones & Laughlin Steel Corp.* 301 U. S. 1, 42):

> "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific cause of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper [fol. 63] subject of judicial notice and requires no citation of instances."

11. Finally I should like to comment on paragraph 21 of Mr. McCaskey's affidavit. There it is said in substance that "petitions regarding plaintiff's relations with its employees" may be filed with the National Board and that because of the action of the defendant Board plaintiff "runs the risk of being ordered to take action which is contrary

to the order and policy of the National Board * * *."
If the "employees" is meant rank and file employees, the paragraph is meaningless on its face. If by "employees" is meant foremen, then the statement is both lacking in substance and wholly inaccurate. It is lacking in substance because of its utter improbability, as reference to the letter of the Buffalo Regional Director of the National Board, annexed to my affidavit dated May 31, 1944, will show. It is inaccurate because, if a petition relating to representation of plaintiff's foremen at its Dunkirk plant were filed with the National Board, that petition (assuming of course that the National Board continues to apply the *Maryland Drydock* decision) would be dismissed. No "order" directed to the plaintiffs would or could be made by the National Board, as the *Maryland Drydock* decision itself shows. More specifically, no order would or could be made forbidding the plaintiff to recognize or deal with the Foremen's Association. Indeed in the *Soss Manufacturing Company* case the National Board itself pointed out, that under its prior decision in the *Maryland Drydock* case, there is nothing unlawful in an employer recognizing and dealing with a union representing its supervisory employees.

12. I respectfully submit that the defendant Board should have judgment declaring that it had and has jurisdiction in the premises.

[fol. 64] H. Myron Lewis.

Sworn to before me this 19th day of July, 1944. William J. Peterson, Notary Public Queens Co. No. 1627; Queens Co., Reg. No. 57-P-6; N. Y. Co. Clk's No. 142; N. Y. Co. Reg. No. 85-P-6. Commission expires March 30, 1946.

[fol. 65] AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York,
County of New York, ss:

Hilda Reichsfeld, being duly sworn, deposes and says that she is a secretary in the office of the attorney for the above named Defendants herein. That on the 19th day of July, 1944 she served Reply Affidavit of H. Myron Lewis sworn

to July 19, 1944 upon Moot, Sprague, Marcy & Gulick, Esqs., the attorneys for the Plaintiff by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 250 West 57th Street in said County of New York directed to said attorneys for the Plaintiff, at No. 302 Erie County Savings Bank Building, Buffalo, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action as the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Hilda Reichsfeld.

Sworn to before me this 19th day of July, 1944. William J. Peterson, Notary Public, Queens Co. No. 1627, Queens Co. Reg. No. 57-P-6, N. Y. Co. Clk's No. 142, N. Y. Co. Reg. No. 85-P-6. Commission Expires Mar, 30, 1946.

[fol. 65a] In Supreme Court of New York, County of Chautauqua

Stipulation

[Same Title.]

It Is Hereby Stipulated that The Allegheny Ludlum Steel Corporation employs more than 12,000 employees in all its plants throughout this country.

The C. I. O. was certified by the National Labor Relations Board on June 29, 1942 as collective bargaining representative of plaintiff's employees, other than foremen, employed at plaintiff's five plants including plants at Brackenridge and West Leechburg, Pennsylvania and Dunkirk, New York, and a single contract was then made on September 10, 1942 covering plaintiff's employees, other than foremen, at said plants.

[fol. 65b] It Is Further Stipulated that the Court may in considering this case refer to and take cognizance of any and all decisions of the National Labor Relations Board and the State Labor Relations Board.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff; William E. Grady, Jr., Attorney for Defendants.

[fol. 66] In Supreme Court of New York, Chautauqua County

The Allegheny Ludlum Steel Corporation

against

William J. Kelley and Myron Lewis, Constituting the State Labor Relations Board of the State of New York

Appearances:

Moot, Sprague, Marcy & Gulick, Esqs., Attorneys for Plaintiff, Welles V. Moot, Esq., William H. Eckert, Esq., and William G. Conable, Esq., of Counsel.

William E. Grady, Jr., Esq., Attorney for Defendants, Philip Feldbloom, Esq., and Norbert M. Phillips, Esq., of Counsel.

Opinion—Filed July 28, 1944

Hinkley, J.

This decision, by agreement of counsel, is not only determinative of defendants' motion to dismiss the complaint under Rules 112 and 113 of the General Rules of Practice but also of the trial of the Equity action itself. There are no disputed questions of fact but only questions of law.

Plaintiff, a Pennsylvania corporation licensed to do business in the State of New York and operating plants in various other states, seeks a declaratory judgment to restrain and enjoin the defendants as the State Labor Relations Board of the State of New York from taking steps to determine a representative of plaintiff's supervisory employees to bargain collectively with plaintiff. Prior to the bringing of the action and on December 30th, 1943, a union of national scope, known as Foreman's Association of America, Allegheny Ludlum Steel Corporation Chapter No. 58, filed with defendants a petition seeking an investigation by defendants by virtue of Article 20 of the State Labor Law and further asking that the Union be certified [fol. 67] as the collective bargaining agent or representative of the foremen or supervisors of plaintiff's Dunkirk plant. This must not be confused with the certification by the National Labor Relations Board of the C. I. O. as bargaining agent or representative of the so-called rank and file of plaintiff's employees in the Dunkirk plant. The defendants proceeded with such investigation and while so act-

ing this action was brought. Since the trial of the case an election has been held and a majority of eligible foremen who voted in that election chose the said Foreman's Union Chapter 58 to be their bargaining agent or representative for the purpose of collective bargaining.

Plaintiff contends that the defendants are without jurisdiction to act in the matter. This contention is based upon the fact that the plaintiff is engaged in interstate commerce and that the jurisdiction rests exclusively with the National Labor Relations Board by virtue of the National Labor Relations Act. (49 Stat. 449, U. S. Code, Title 29, Chapter 7, U. S. C. A. 151.) Plaintiff also contends that if the defendants have jurisdiction under ordinary circumstances that they are not authorized to receive and act upon the petition of the said Foreman's Union because of a definite policy adopted by the National Labor Relations Board decreeing that a unit composed entirely, as this one is, of foremen or those occupying a supervisory position with the Company is not an appropriate unit for collective bargaining.

Defendants contend that they are vested with jurisdiction; that they were required to act; that they are not controlled by any policy of The National Labor Relations Board; and that the Union in question is an appropriate bargaining agent for collective bargaining.

This decision would be easily arrived at were it settled by judicial decisions that The National Labor Relations Board, whether acting or not, covered the whole field of [fol. 68] employer and employee relations in industries engaged in interstate commerce. For this plaintiff is almost exclusively engaged in interstate commerce and it cannot be said by any stretch of the imagination that it is subject to the minimus rule. On the contrary, the law is well settled that defendants have jurisdiction to act when their acts do not conflict with those of The National Labor Relations Board or in the event that the latter Board has taken no steps to accept jurisdiction. (Matter of Davega vs. City Radio, etc., 281 N. Y. 13.), or unless the intention of Congress is clearly expressed that the Federal Board shall cover the entire field.

Although The National Labor Relations Board has assumed jurisdiction to certify a representative for collective bargaining between plaintiff and the rank and file of plain-

tiff's employees in the Dunkirk plant, the National Board has never been petitioned by the Foreman's Union involved herein, nor by any other similar union or group, asking to be designated as bargaining agent or representative of the plaintiff's Dunkirk plant. Nor has The National Labor Relations Board done any act in relation to collective bargaining by the foremen or supervisors of that plant.

This brings us to the narrow question as to whether the adoption by The National Labor Relations Board of a definite policy to refuse to recognize foremen unions or groups as appropriate bargaining units in controlling upon defendants. This is not, as defendants' counsel contend, the determination by The National Labor Relations Board or the defendants of a question of fact in each individual case. It is a definite policy, broad in its scope, and based upon the definite conclusion of the National Board that such type of unions or groups are not appropriate bargaining agents and should not be recognized.

If such policy is controlling upon defendants then it ousts them of any jurisdiction to act in this or any similar case. [fol. 69] The Court, at this time, as defendants' counsel contend, is not in a position to review the action of defendants in their administrative capacity. Plaintiff must stand or fall upon its claim that, by reason of a declared policy of a superior board, the defendants are without jurisdiction to act in this case. If defendants are without jurisdiction to act, then there is ample authority for a declaratory judgment. (Section 473, C. P. A. Dun & Bradstreet, Inc. vs. City of New York, 276 N. Y., 198. Bank of Yorktown vs. N. Y. S. L. R. B., 280 N. Y, 673.)

That there is a sharp conflict between the policy of The National Labor Relations Board and that of the defendants is most clear. The view taken by The National Labor Relations Board that it will not lend itself to collective bargaining by foremen unions or groups is clearly shown by its language in the Maryland Drydock cases (49 N. L. R. B., 733) and other of its decisions and in the letter of the regional director attached to defendants' moving papers. That the defendants take the opposite view and feel in duty bound to aid foremen unions or groups in collective bargaining is shown by their decision No. 2751 in this case, which decision is attached to defendants' answer.

The Court is not called upon nor does it desire to express its opinion of the logic or reasoning or right or wrong of the conflict of policy of the Federal and State Labor Relations Boards. In the absence of a definite intent of statutory regulation and in the further absence of judicial precedent, the Court cannot properly decree that in this instance the defendants are without jurisdiction to act simply because The National Labor Relations Board would not act under similar circumstances. Nor can the plaintiff arbitrarily refuse to recognize the State Labor Relations Board because it disagrees with the policy of that Board. Under the circumstances of this case, the plain-
[fol. 70] tiff is called upon to co-operate to the fullest extent with the New York State Labor Relations Board and the certified representative of the foreman group or union until such time, if it arises, that the defendants are ousted from jurisdiction by The National Labor Relations Board.

The Court cannot read into the legislation upon labor relations any intent upon the part of Congress to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce by the act of Congress in creating The National Labor Relations Board. If so, then state action would be precluded. (Napier vs. Atlantic Coast Line, 272 U. S., 605, at 613; Oregon-Washington R. & N. Co. vs. Washington, 270 U. S., 87) Congress cannot be held to have intended to supercede or suspend the exercise of reserved powers of a State, even when that may be done, unless and except so far as its purpose to do so is clearly manifested. (Illinois Central R. Co. vs. Public Utilities Com., 245 U. S., 493, 510. Approved in Welch Co. vs. New Hampshire, 306 U. S., 79, 85.)

Here we have, in the language of Chief Justice Stone (Cloverleaf vs. Patterson, 315 U. S., 148 at 170 dissenting opinion) an unexercised discretionary power given by Congress to a Federal Board as a means of regulating interstate commerce, when the full exercise of its authority would conflict with an assertion of the State power. But only in a case where the intention of Congress to give to the Federal Board exclusive control over the entire field is clearly manifested can the power of the State to act be superceded. (N. W. Bell Tel. Co. vs. Ry. Commission, 297 U. S., 471.) In the absence of such clear intention, it can-

not be said that the failure of the Federal Board to exercise its full power is in effect a controlling administrative ruling that no further regulation by either Federal or State government is proper or needful.

It follows that defendants' motion to dismiss the plaintiff's complaint under Rules 112 and 113 must be granted [fol. 71] and judgment entered in favor of defendants dismissing plaintiff's complaint upon the merits and not as matter of discretion.

Order and judgment may be entered in accordance with this decision, with opportunity to counsel to file requests to find and conclusions of law, if such intention is indicated within a reasonable time.

Alonzo G. Hinkley, Justice, Supreme Court.

July 27th, 1944.

[fol. 72] In Supreme Court of New York, Chautauqua County

[Title omitted]

Notice of Appeal—Filed June 7, 1945

Please Take Notice, that pursuant to the provisions of Subdivision 1 of Section 588 of the Civil Practice Act, the above-named plaintiff, Allegheny Ludlum Steel Corporation, relying upon questions herein raised involving the construction of the Constitution of the United States of America, hereby appeals as of right to the Court of Appeals of the State of New York from the final judgment herein dated the 28th day of May, 1945, and filed and entered on that day in the office of the Clerk of Chautauqua County pursuant to the order of affirmance of the Appellate Division of the Supreme Court, Fourth Judicial Department, dated the 1st day of May, 1945, filed and entered in the office of the Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department on the 2nd day of May, 1945, which said judgment adjudges that the order made by Mr. Justice Hinkley on October 3, 1944, dismissing the complaint on the merits and the judgment entered herein on October 4, 1944 dismissing said complaint upon the merits with costs, be affirmed with costs in the

amount of $140.78, and from each and every part of the said judgment and from the whole thereof.

Dated: Buffalo, New York, June 6th, 1945.

Moot, Sprague, Marcy & Gulick, Attorneys for Plaintiff, Office and P. O. Address, 302 Erie County Bank Bldg., Buffalo 2, New York.

To. William E. Grady, Jr., Attorney for Defendants, Office and P. O. Address, 250 West 57th Street, Borough of Manhattan, City of New York; Clerk of the County of [fol. 73] Chautauqua, Mayville, New York.

[File endorsement omitted.]

[fol. 74] In Supreme Court of New York, County of Chautauqua

The Allegheny Ludlum Steel Corporation, Plaintiff,

against

William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, Defendants.

Judgment—Entered May 28, 1945

Plaintiff having appealed to the Appellate Division of the Supreme Court, Fourth Judicial Department, from an order duly made herein by Mr. Justice Hinkley, duly entered in the office of the Clerk of this Court on October 3rd, 1944, and from a judgment duly entered thereon in the office of the Clerk of this Court on October 3rd, 1944, dismissing the complaint herein,

And, said appeal having been duly heard by the said Appellate Division, and the said Appellate Division having in the term commencing the 1st day of May, 1945, duly ordered unanimously that the said order and judgment, so appealed from, be affirmed with costs to the defendants,

Now, on motion of William E. Grady, Jr., Esq., attorney for the defendants, it is

Adjudged, that the order made by Mr. Justice Hinkley and the judgment entered thereon, so appealed from, be,

and the same hereby are, in all things affirmed; and it is further

Adjudged, that the defendants, William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, of 250 West 57th Street, Borough of Manhattan 19, City and State of New York, recover of the plaintiff, The Alleghany Ludlum Steel Corporation, of Dunkirk, New York, its costs, amounting to the sum of $140.78, as taxed, and that the defendants have execution therefor.

[fol. 75] Entered this 28th day of May, 1945, at 2 P. M.
C. E. Goodrich, Clerk.

[fol. 76] In Supreme Court of New York, Appellate Division

At a term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 1st day of May, 1945.

Present: Hon. Marsh N. Taylor, Presiding Justice; Hon. William P. Dowling, Hon. Francis D. McCurn, Hon. George A. Larkin, Hon. William F. Love, Associate Justices.

The Allegheny Ludlum Steel Corporation, Appellant,

vs.

William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, Respondents.

Order of Affirmance

The above named The Allegheny Ludlum Steel Corporation, plaintiff in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Chautauqua, on the 3rd day of October, 1944, and from an order entered in said Clerk's office on the same day, and the said appeal having been argued by Mr. Welles V. Moot, of counsel for the appellant, and by Mr. William E. Grady, Jr., of coun-

sel for the respondents, and due deliberation having been had thereon

It is hereby Ordered, That the judgment and order so appealed from be, and the same hereby are, affirmed with costs.

All concur.

Enter, Marsh N. Taylor.

Entered 2nd day of May, 1945.

Herbert E. Wait, Clerk.

[fol. 77] SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Clerk's Office, Rochester, N. Y.

I, Herbert E. Wait, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order made by said court upon the appeal in the within entitled action or proceeding, and of the whole thereof, and that the original case and papers upon which said appeal was heard are hereunto annexed.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 2nd day of May, 1945.

Herbert E. Wait, Clerk. (Seal.)

[fol. 77a] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of November in the year of our Lord one thousand nine hundred and forty-five, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—November 30, 1945

THE ALLEGHENY LUDLUM STEEL CORPORATION, Appellant,

ag'st

WILLIAM J. KELLEY & ANO., &c., State Labor Relations Board of the State of New York, Respondents

Be It Remembered, That on the 28th day of August in the year of our Lord one thousand nine hundred and forty-five, The Allegheny Ludlum Steel Corporation, the appellant in this cause, came here unto the Court of Appeals, by Moot, Sprague, Marcy & Gulick, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department.

And William J. Kelley and another, &c., State Labor Relations Board of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by William E. Grady, Jr., their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Welles V. Moot, of Counsel for the appellant, and by Mr. William E. Grady, Jr. of counsel for the respondents, and after due deliberation had thereon, [fol. 77b] did order and adjudge that the Judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said Judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, Clerk's Office,
Albany, November 30, 1945.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 78] IN SUPREME COURT OF NEW YORK, COUNTY OF CHAUTAUQUA

Present Hon. Parton Swift, Justice

THE ALLEGHENY LUDLUM STEEL CORPORATION, Plaintiff,

against

WILLIAM J. KELLEY and H. MYRON LEWIS, constituting the State Labor Relations Board of the State of New York, Defendants.

ORDER ON REMITTITUR—December 26, 1945

Plaintiff having appealed to the Appellate Division of the Supreme Court, Fourth Judicial Department from an order duly made herein by Mr. Justice Hinkley, duly entered in the office of the Clerk of this Court on October 3, 1944, and from a judgment duly entered thereon in the office of the Clerk of this Court on October 3, 1944, dismissing the complaint herein, and said appeal having been duly heard by the said Appellate Division, and the said

Appellate Division having in the term commencing on the 1st day of May, 1945, duly ordered unanimously that the said order and judgment so appealed from, be affirmed with costs to the defendants, and a judgment having on the 28th day of May, 1945, been duly entered in the office of the Clerk of this Court upon the said order and remittitur of the said Appellate Division, and the plaintiff having appealed to the Court of Appeals from the said order of the Appellate Division and the judgment entered thereon, and the said appeal having been duly argued at the said Court of Appeals and the said Court of Appeals after due deliberation having ordered and adjudged that the said judgment of the Appellate Division, so appealed from, be affirmed [fol. 79] with costs and having ordered and adjudged that the proceedings therein be remitted to this Court to be proceeded upon according to law.

Now, on reading and filing the remittitur from the said Court of Appeals of the State of New York, dated November 30, 1945, and upon motion of William E. Grady, Jr., Esquire, attorney for the defendants herein, it is hereby

Ordered, that the aforesaid order and judgment of the Court of Appeals, be, and the same hereby is, made *and* the order and judgment of this Court.

Enter in Chautauqua County.

Parton Swift, J. S. C.

Erie Special Term, 12-26-45. Granted and Ordered. Entered in Chautauqua County Clerk's Office.

G. V. Laughlin, Sp. Dep. Co. Clerk.

[fol. 80] In Supreme Court of New York, Chautauqua County

The Allegheny Ludlum Steel Corporation, Plaintiff,

against

William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, Defendants.

Judgment on Remittitur—Entered December 28, 1945

Plaintiff having appealed to the Appellate Division of the Supreme Court, Fourth Judicial Department, from an order duly made herein by Mr. Justice Hinkley, duly

entered in the office of the Clerk of this Court on October 3rd, 1944, and from a judgment duly entered thereon in the office of the Clerk of this Court on October 3rd, 1944, dismissing the complaint herein,

and, said appeal having been duly heard by the said Appellate Division, and the said Appellate Division having in the term commencing the 1st day of May, 1945, duly ordered unanimously that the said order and judgment, so appealed from, be affirmed with costs to the defendants, and the defendants having on the 28th day of May, 1945, entered judgment upon the order and remittitur of the said Appellate Division,

and, the plaintiff having appealed to the Court of Appeals from the said order of the Appellate Division and the judgment entered thereon, and the said appeal having been duly argued before the Court of Appeals, and after due deliberation the Court of Appeals by its order and remittitur dated November 30, 1945, having duly ordered and adjudged that the said order of the said Appellate Division of the Supreme Court and the judgment entered thereon, so appealed from, be affirmed with costs, and the said Court of Appeals having further ordered that the record and proceedings therein be remitted to this Court, here to be proceeded upon [fol. 81] according to law,

and, this Court having by its order duly made herein on the 26 day of December, 1945 and duly entered in the office of the Clerk of this Court on the 27 day of December, 1945, duly ordered that the aforesaid order and judgment of the Court of Appeals be, and it thereby was, made the order and judgment of this Court,

now, on motion of William E. Grady, Jr., Esq., attorney for the defendants, it is hereby

adjudged, that the aforesaid order of the Appellate Division and the judgment entered thereon, so appealed from, be, and the same hereby are, in all things affirmed; and it is further

adjudged, that the defendants, William J. Kelley and H. Myron Lewis, constituting the State Labor Relations Board of the State of New York, of 250 West 57th Street, Borough of Manhattan 19, City and State of New York, recover of the plaintiff, The Allegheny Ludlum Steel

Corporation, of Dunkirk, New York, its costs, amounting to the sum of $170.00 as taxed, and that the defendants have execution therefor.

Entered this 28 day of December, 1945, at 10.55 A. M.
Clark E. Goodrich, Clerk.

[fol. 82] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, CHAUTAUQUA COUNTY, TO THE SUPREME COURT OF THE UNITED STATES—Filed March 5, 1946.

To the Chief Judge of the Court of Appeals of the State of New York:

The Allegheny Ludlum Steel Corporation, your petitioner, respectfully shows:

1. Petitioner is the appellant in the above entitled cause.

2. Petitioner served a complaint on the appellees in the Supreme Court of the State of New York for the County of Chautauqua on April 14, 1944, praying for a declaratory judgment (inter alia) that the above named appellees, constituting the New York State Labor Relations Board, had no jurisdiction over petitioner or over the supervisory employees of the petitioner at its plant at Dunkirk, New York; that the said Board might not properly certify the Foremen's Association of America, Allegheny Ludlum Steel Corporation Chapter 58, as the appropriate collective bargaining unit for the foremen or other supervisory employees of petitioner at its said plant; that the New York State Labor Relations Board had no jurisdiction to hold an election for the purpose of determining a representative of said supervisory employees to bargain collectively with any such representative; and that the said Board be restrained and enjoined from holding or attempting to hold an election for the said purpose or from taking any other action in connection with petitioner or its employees under the provisions of the New York State Labor Relations Act (Labor Law, Article 20, L. 1937, c. 443, §1, as amended,

[fol. 83] 30 McKinney's Consolidated Laws, §§700-716, effective May 20, 1937). On October 3, 1944, an order was entered at a special term of the said court granting appellees' motion for judgment on the pleadings and motion for summary judgment and directing that judgment be entered in favor of appellees and against petitioner, dismissing the complaint on the merits and not as a matter of discretion, and judgment was entered accordingly.

3. On appeal from the said judgment to the Appellate Division, Fourth Department, of the Supreme Court of the State of New York, the judgment was unanimously affirmed on the merits by the said Appellate Division by an order dated May 1, 1945, and judgment of affirmance pursuant to the said order was entered in the office of the Clerk of Chautauqua County.

4. An appeal from the said judgment of affirmance to the Court of Appeals of the State of New York, being the highest court of the said State in which a decision in the suit could be had, was taken as of right, pursuant to Article 38, §588, subdivision 1, of the Civil Practice Act, L. 1942, c. 297. The order of the Appellate Division affirming the judgment of the Supreme Court for Chautauqua County being unanimous, the appeal lay as of right only because there was directly involved the construction of the Constitution of the United States. The judgment was affirmed by the said Court of Appeals on November 30, 1945, and the record and proceedings in the cause were remitted into the Supreme Court of the State of New York. The order and judgment of the said Court of Appeals was made the order and judgment of the said Supreme Court by order of Mr. Justice Parton Swift on December 26, 1945, entered in the office of the Clerk of Chautauqua County on December 27, 1945. Judgment on the said order was entered by the Clerk of the said county on December 28, 1945.

5. In the said cause there was drawn in question the validity of a statute of the State of New York on the ground [fol. 84] of its being repugnant to the Constitution or laws of the United States and the decision was in favor of its validity, in that the Labor Law, Article 20, of the State of New York, L. 1937, c. 443, §1, as amended, 30 McKinney's Consolidated Laws §§700-716, effective May 20, 1937, was upheld as applied to the designation of a collective bargain-

ing unit and the holding of an election for the purpose of determining a representative for the supervisory employees of petitioner, which employees at all times herein relevant were engaged in interstate commerce. Petitioner respectfully represents that the said law of the State of New York as so applied is repugnant to the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. §§151-166, approved July 5, 1935, and to Article I, Section 8, Clause 3, and Article VI, Clause 2, of the Constitution of the United States, in regulating commerce among the several States.

Wherefore petitioner prays for the allowance of an appeal from the said Supreme Court of the State of New York, Chautauqua County, from the judgment of the said court entered in the office of the Clerk of Chautauqua County on the 28th day of December, 1945, upon the order and judgment of the Court of Appeals of the State of New York dated November 20, 1945, which was adopted and became the order and judgment of the said Supreme Court by an order of Mr. Justice Parton Swift dated the 26th day of December, 1945, and entered in the office of the Clerk of Chautauqua County on the 27th day of December, 1945, to the Supreme Court of the United States, in order that the order and judgment of the Court of Appeals of the State of New York and the said judgment of the said Supreme Court of the State of New York entered thereon may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of New York, Chautauqua County, may be sent to the Supreme Court of the United States as provided by law.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assign-
[fol. 55] ment of errors and prayer for reversal filed herewith. A statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment appealed from is also filed herewith.

Dated: 2/19/'46.

John G. Buchanan, Welles V. Moot, Attorneys for The Allegheny Ludlum Steel Corporation, Petitioner.

[fol. 86] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed March 5, 1946

The above named appellant assigns the following errors in the record and proceedings in the above entitled case:

1. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the Labor Law, Article 20, L. 1937, c. 443, §1, as amended, 30 McKinney's Consolidated Laws, §§700-716, effective May 20, 1937, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board under the provisions of the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. §§151-166, approved July 5, 1935. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

[fol. 87] 2. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the said Labor Law, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor

Relations Board, which under the provisions of the said National Labor Relations Act had already certified a representative for purposes of collective bargaining for other employees of the appellant at the same plant. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

3. The Court of Appeals of the State of New York erred in affirming the judgment dismissing the complaint upon the merits, for in so doing it held that the laws of the State of New York, and particularly the said Labor Law, gave the appellees jurisdiction to decide the unit appropriate for the purposes of collective bargaining, to investigate a controversy concerning the representation of supervisory employees of the appellant, and to certify the name or names of the representatives designated or selected, though the said employees were engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board, which under the provisions of the said National Labor Relations Act had already certified a representative for purposes of collective bargaining for other employees of the appellant at the same plant and had expressed a policy against recognizing [fols. 88-111] supervisory employees as constituting an appropriate collective bargaining unit. The said Labor Law of New York as so applied is repugnant to Article I, Section 8, clause 3, and Article VI, clause 2, of the Constitution of the United States and to the said National Labor Relations Act, being a regulation of commerce among the several States in violation of a law of the United States regulating such commerce, which is the supreme law of the land.

Wherefore appellant prays that the judgment of the Supreme Court of the State of New York for Chautauqua County, which made the order and judgment of the Court of Appeals of the State of New York its order and judgment, be reversed, and that judgment be entered for appel-

lant in accordance with the prayers of its complaint, and for its costs sustained in the action.

Dated: February 19, 1946.

John G. Buchanan, Welles V. Moot, Attorneys for The Allegheny Ludlum Steel Corporation, Appellant.

[fol. 112] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 5, 1946

The petition of The Allegheny Ludlum Steel Corporation for an appeal in the above case to the Supreme Court of the United States from the Supreme Court of the State of New York for Chautauqua County, from the judgment of the said court entered in the office of the Clerk of Chautauqua County on the 28th day of December, 1945, upon the order and judgment of the Court of Appeals of the State of New York dated November 30, 1945, which was adopted and became the order and judgment of the said Supreme Court by order of Mr. Justice Parton Swift dated the 26th day of December, 1945, and entered in the office of the Clerk of Chautauqua County on the 27th day of December, 1945, the assignment of errors and prayer for reversal filed therewith, and the record of said cause having been considered, it is

Ordered that an appeal be, and it hereby is, allowed to the Supreme Court of the United States from the Supreme Court of the State of New York for Chautauqua County, from the judgment of the said court entered in the office of the Clerk of Chautauqua County on the 28th day of December, 1945, upon the order and judgment of the Court of Appeals of the State of New York, dated November 30, 1945, which was adopted and became the order and judgment of the said Supreme Court by an order of Mr. Justice Parton Swift dated the 26th day of December, 1945, and entered in the office of the Clerk of Chautauqua County on the 27th day of December, 1945, as prayed in said petition, and that the Clerk of the Supreme Court of the State of New York [fol. 113] for Chautauqua County shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the

United States within forty days from the date hereof; and it is further

Ordered that said The Allegheny Ludlum Steel Corporation shall give good and sufficient security in the sum of Two Thousand dollars, that the said appellant shall prosecute its appeal to effect, and, if it fail to make its plea good, shall answer all costs.

The said appellant now presenting a bond in the sum of Two Thousand dollars, with American Bonding Company of Baltimore, as surety, it is

Ordered that the same be, and it hereby is, approved. Dated: February 23, 1946.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

[fols. 114-115] Citation in usual form showing service on William E. Grady, Jr., filed March 5, 1946, omitted in printing.

[fol. 116] SUPREME COURT OF THE UNITED STATES

STIPULATION INDICATING PORTIONS OF RECORD TO BE INCLUDED IN TRANSCRIPT—Filed March 5, 1946

It is hereby stipulated and agreed by and between the undersigned attorneys for the appellant and the undersigned attorney for the appellees in the cause above named that the portions of the record which shall constitute the transcript of record on the appeal to the Supreme Court of the United States herein shall consist of the following:

1. Notice of Appeal to the Appellate Division.
2. Judgment of the Supreme Court, Chautauqua County, entered October 3, 1944.
3. Order of the Supreme Court, Chautauqua County, filed October 3, 1944.
4. Summons.
5. Complaint.
6. Amended Answer.
7. Notice of Motion.
8. Affidavit of H. Myron Lewis, in Support of Motion.
9. Affidavit of Ernest E. Cavagnaro, in Support of Motion.
10. Affidavit of Stanley A. McCaskey, in Opposition to Motion.

11. Reply Affidavit of H. Myron Lewis, in Support of Motion.

12. Stipulation (as to number of appellant's employees, certification of collective bargaining representative of employees other than foremen, etc.).

13. Opinion of the Supreme Court, Chautauqua County.

[fol. 117] 14. Notice of Appeal to the Court of Appeals.

15. Judgment of Affirmance of the Appellate Division.

16. Order of Affirmance of the Appellate Division.

17. Affidavit of No Opinion.

18. Order and remittitur of the Court of Appeals.

19. Order of the Supreme Court, Chautauqua County, dated December 26, 1945.

20. Judgment of the Supreme Court, Chautauqua County, entered December 28, 1945.

21. Petition for Appeal to the Supreme Court of the United States.

22. Assignment of Errors and Prayer for Reversal.

23. Appellant's Jurisdictional Statement.

24. Order Allowing Appeal.

25. Citation.

26. This Stipulation.

The Clerk of the Supreme Court of the State of New York ~~for the County~~ of Chautauqua is requested to prepare a transcript of the record as required by law and the Rules of the Supreme Court of the United States and to include therein the papers above designated, and no others, and to transmit the said transcript to the Clerk of the Supreme Court of the United States at Washington, District of Columbia, on or before the 4th day of April, 1946.

This stipulation is made and entered into pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

Dated this 2 day of March, 1946.

John G. Buchanan, Welles V. Moot, Attorneys for Appellant. William E. Grady, Jr., Attorney for Appellees.

[fols. 118-119] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 120] SUPREME COURT OF THE UNITED STATES

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STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed April 13, 1946

Comes now The Allegheny Ludlum Steel Corporation, the appellant in the above entitled cause, and adopts its assignments of error as its statement of the points on which it intends to rely, and states that the whole of the record as filed is necessary for the consideration thereof.

Dated: April 3, 1946.

John G. Buchanan, Counsel for Appellant.

Service of the above statement and designation, and the receipt of a copy thereof, are hereby acknowledged this 11 day of April, 1946.

William E. Grady, Counsel for Appellees.

[fol. 120a] [File endorsement omitted.]

[fol. 121] SUPREME COURT OF THE UNITED STATES

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ORDER NOTING PROBABLE JURISDICTION—April 22, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is consolidated with No. 941, Bethlehem Steel Company et al. vs. New York State Labor Relations Board for argument. The Solicitor General of the United States is requested to file a brief as *amicus curiae* and, if so advised, to participate in the oral argument.

Mr. Justice Jackson took no part in the consideration or decision of this order.

Endorsed on cover: File No. 50,751, New York Supreme Court, Chautauqua County. Term No. 76. The Allegheny Ludlum Steel Corporation, Appellant, vs. William J. Kelley and H. Myron Lewis, Constituting the State Labor Relations Board of the State of New York. Filed April 3, 1946. Term No. 76 O. T. 1946.